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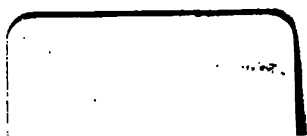


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THE
IRISH EQUITY PLEADER:

BEING
A COLLECTION OF FORMS
OF
PLEADINGS IN EQUITY SUITS IN IRELAND,
WITH
PRELIMINARY DISSERTATIONS AND PRACTICAL NOTES.

BY
EDWARD H. BURROUGHS
AND
HENRY B. GRESSON, ESQRS.,
BARRISTERS-AT-LAW.

PART THE SECOND.

DUBLIN :
HODGES AND SMITH, 104, GRAFTON-STREET,
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ON NEW RULES IN CHANCERY AND EXCHEQUER.

PRELIMINARY DISSERTATION.

CONTENTS:

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THE new General Orders of the Courts of Chancery and Exchequer in Ireland, have made extensive alterations with respect to practice and pleading in Equity. A consideration of such of these Rules as affect the construction of bills in Equity, will form a suitable introduction to the precedents contained in the following pages.

The changes induced by these Orders in the frame of a bill are designed, some of them to diminish the number of parties to a suit in Equity, and others to diminish the length of pleadings: the former class of Rules, relating to the important subject of parties, shall first be considered.

We have already stated the General Rule, *ante*, pp. 30, 45, that all persons materially interested in the subject of litigation, or whose rights will be directly affected by the decree ought to be parties.

We have also seen that previous to, and independently of the late Orders, this General Rule is subject to exceptions; thus, the presence of a party

Alterations by the new Rules.

In respect to parties.

State of the law before the late Orders.

General Rule. First exception.

Second excep-
tion.

Third excep-
tion.

Fourth excep-
tion.

Fifth excep-
tion.

may, in many cases, be dispensed with by pleading and proving that he is out of the jurisdiction; *Willats v. Busby*, 5 Beav. 193. Again, in a suit for administration of the assets of a deceased debtor, a single creditor may sue on behalf of himself, and all the other creditors; and if real estate be vested in trustees to pay debts, not scheduled, the creditors need not be parties, *ante*, p. 35; and see *Batten v. Parfitt*, 2 Y. & Col. C. C. 343; and in order to prevent a denial of justice where a great number of parties have a common interest, as, for example, members of a company, there a few will be permitted to represent the rest; *Taylor v. Salmon*, 4 Myl. & Cr. 134; *Walworth v. Holt*, 5 Jur. 237.

Several other cases evince the disinclination of the Courts, in modern times, to yield to objections for want of parties; *Sowersby v. Lacy*, 4 Mad. 141; *Keon v. Magawly*, 1 Dru. & War. 405; and see *ante*, p. 46.

Finally, in a suit for the administration of the personal estate of a deceased person, the executor or administrator has always been considered, at Law and in Equity, as representing the testator or intestate, and as having the same absolute power which the testator in his life-time had, over the whole personal estate, even though it be specifically bequeathed. The executor is a trustee for the creditors and legatees; the administrator is a trustee for the creditors and next of kin; both executor and administrator are authorized and empowered to dispose of the trust fund, although of course bound to account to their *cestuique trusts* for its application; yet, on the other hand, the *cestuique trusts* are considered as being fully represented by their trustee, for which reason it is improper, in a suit for a legacy payable out of personal estate, to make the other legatees, or even the residuary legatees, parties to the suit; *Wainwright v. Waterman*, 1 Ves. Jr. 311.

But in a suit by one of the residuary legatees, or one of the next of kin, to recover his share of the residue of personal estate, the other unpaid residuary legatees, or next of kin, are necessary parties; *Skerrit v. Birch*, 3 Bro. C. C. 229.

Notwithstanding these several exceptions, the General Rule requiring that all persons interested should be brought before the Court, was found to press heavily on the suitor, and to occasion very serious expense and delay in the prosecution of the suit.

In order to
lessen the delay
and expense of
a suit in equity
several parties
are now dis-
pensed with,
thus:

1. The late
Rules render
cestuique trusts
of real estates
unnecessary
parties.

A main object, therefore, of the late General Orders has been to cheapen and expedite litigation, by dispensing altogether with large classes of parties, previously considered necessary, and by dispensing with the appearance and answers of a numerous body of parties, who may be termed "special defendants," and who, without much expense to the fund, or delay to the suit, are now bound by the proceedings. Thus, the persons beneficially interested in real estate, as we have already observed, must have been, in most cases, made parties to a suit for a sale of the estate; see *ante*, p. 35; but the late General Orders have applied to suits concerning real estate, the rule heretofore confined to suits concerning personal estate, which makes the trustee represent the *cestuique trusts*; for now, in all suits concerning real estate, where the estate is vested by conveyance or devise in

trustees competent to sell; or where the trustees have an immediate power of sale of real estate, which it is their duty to execute; such trustees shall represent the persons beneficially interested in such real estate, or the proceeds thereof, so that the latter need not be parties to the suit, subject, however, to the following observations, viz.:

If the trustees be incompetent to give discharges, *both* for the proceeds of the sale and for the rents and profits of the estate until sold, the trustees will not, in the Court of Exchequer in Ireland, represent the *cestuique trusts*, who must therefore all be brought before the Court, as special defendants, in the mode prescribed by the Rules.

But note a variance between the Rules in Chancery and Exchequer.

The power to give discharges may be implied; *Ball v. Harris*, 4 Myl. & Cr. 264; Id. 420. If the suit be in the Court of Chancery, it seems to be immaterial whether the trustees are or are not competent to give discharges for the proceeds of the sale.

But if the trustees be incompetent to give discharges for the rents and profits until sale, the persons beneficially interested in such rents and profits shall, in a Chancery suit, be represented, not by the trustees, but by the person entitled to such rents and profits at the time of filing the bill, who must, therefore, in Chancery, be served with *subpœna* in the ordinary way.

2. The trustees shall represent the *cestuique trusts* in the same manner only, and to the same extent only, as executors or administrators in suits concerning personal estate, represent the persons beneficially interested therein. If, therefore, a suit be instituted by a person interested in the surplus or residue of an estate which will remain after payment of debts, &c. charged thereupon, the several other parties interested in such surplus or residue must be parties.

The trustee of real estate represents the *cestuique trust* no further than does the trustee of personal estate.

3. The Court may at the hearing, or in the Court of Exchequer, at any time pending the cause, order the *cestuique trusts* to be made parties; see *Osborne v. Foreman*, 2 Hare, 656; General Orders in Chancery, Nos. 24, 25, and 26; and General Orders, Exchequer, No. 16.

4. The trustee will not represent the *cestuique trust* if the equitable interest only be vested in the trustee, without a power to sell, *Turner v. Hind*, 12 Sim. 414.

It may be useful to observe, that cases upon the General Order of the Court of Chancery in England, issued 26th August, 1841, No. 30, being the Order corresponding with those under consideration, must be read with caution by the Irish practitioner. The English Rule seems to apply to those cases only where the legal estate is vested in the trustees by devise; *Turner v. Hind*, *sup.* (12 Sim. 414); *Weatherby v. St. Georgio*, 2 Hare, 624; *Osborne v. Foreman*, Id. 656; *Turner v. Hyde*, 5 Jur. 1129; and see *Wilton v. Jones*, 2 Y. & Col. C. C. 244.

Note the variance between the Rules of the Courts in Ireland, and those of the Court of Chancery in England.

The Irish Rules are more extensive, embracing cases where estates are vested in trustees by deed, as well as by will; and also cases where trustees have a mere power of sale, without any estate in the land to be sold.

The heir at law of a testator was heretofore considered a necessary party in a suit to execute the trusts of a will of real estate, although the heir be altogether disinherited, so as to have no interest whatever in the estate;

2. The late Rules render the heir of a testator unneces-

ary in suit to execute trusts of will, thereby changing the law on this subject.

and if no heir could be found, the Attorney-General was made a party to the bill filed for execution of the trusts of the will.

And yet, if the testator had by act *inter vivos*, conveyed his entire estate upon trusts, so as to leave himself no surplus, neither the grantee, nor, after his death, his heir, would be necessary parties to a suit for execution of the trusts of the deed. Nor if the testator had made a prior will would the devisees in the first will be parties necessary to a suit for execution of the trusts of the latter will; Mitf. Pl. 172 (4th ed.)

And even though the plaintiffs did not seek to have the will formally proved and established against the heir at law, but only to raise a charge on the estate, still the effect of the suit being *pro tanto* to dispose of the inheritance, the heir was required to be before the Court; but if the plaintiff's object was only to raise a charge, one witness to the will, who could prove all the requisites, was always considered sufficient; whereas, if the plaintiff wished to have the will declared to be duly proved as against the heir at law, it was and is necessary to examine all the witnesses to the will.

If, indeed, the fact were charged and proved, that the heir was out of the jurisdiction, the Court would, upon proof of the due execution of the will and sanity of the testator, have directed the execution of the trusts of the will, notwithstanding the absence of the heir; and where there had been several years' quiet possession under the will, the Court directed a sale without making the heir a party.

But decrees made in the absence of the heir would not prevent him from afterwards disputing the will, Mitf. Pl. 172 (4th ed.)

Unless a decree is required that the will be established against the heir;

Such was the law of the Courts on this subject; but now in suits to execute the trusts of a will, it will not be necessary to make the heir at law a party; the plaintiff, however, will be at liberty to make the heir at law a party, where he desires to have the will established against him. For example, in a suit by trustees of a will disposing of real estate, the trustees may be unwilling to act in the trust without having the will proved in such a way as to protect them against the possibility of the heir at any time disputing the will; and, in such case, they may file a bill against the heir, praying that the will may be established against him, and that the trusts thereof may be carried into execution: if the heir admit the will, such admission will dispense with proof of the execution of the will and of the sanity of the testator, which if the heir were not a party would seem to be necessary, regarding the devise merely in the light of a conveyance, and on the same principle that such proof was always required if the heir were abroad.

which will never be made against an infant heir.

If the heir be an infant, the Court would not establish the will against him, even if he were before the Court, so that there can be no object in making him a party; Hills v. Hills, 2 Y. & Col. C. C. 327.

Even independently of the Rule under consideration, it would seem to be no objection to the title of an estate sold under a decree directing a sale of the devised estate, that the heir of the deviser was not a party to the

suit. See *Wakeman v. Duchess of Rutland*, 3 Ves. 233; also, General Order in Chancery, No. 27; and General Order, Exchequer, No. 17.

Again, in the case of a joint and several demand, the rule that all persons interested must be parties, prevented the plaintiff from suing any of the parties liable, without making them all parties, all being interested in the amount, *Blois v. Blois*, 2 Vent. 348. Thus, in the case of principal and surety, it often happened that the circumstances of the principal debtor were such as to leave no hope of recovering any part of the debt from him, yet was he a necessary party in a suit against the surety.

3. The late Rules render unnecessary the parties jointly and severally liable with the defendant;

But now, each party liable may be sued separately; as, for example, if a breach of trust be committed by co-executors, the *cestuique trust* may proceed against one in the absence of the others, *Perry v. Knott*, 5 Beav. 293; *Kellaway v. Johnson*, *ib.* 319; so also the plaintiff may file his bill against one or more of the sureties, without making the principal or other sureties parties to the suit. Still, however, if the demand be joint, all the parties liable must be made parties; see *Allan v. Houlden*, 6 Beav. 148; and though the demand be joint and several, all the parties liable *may* be made parties by the plaintiff, if he think fit; or upon the motion of the defendant before the hearing, or by the direction of the Court at the hearing; Orders in Chancery, No. 24; Orders in Exchequer, No. 18. So far, as to the operation of the late Chancery Orders in reducing the number of parties necessary to the frame of a bill in Equity.

But this is not the only mode by which these Rules diminish the expense of an Equity suit. In almost every Equity suit there are certain parties against whom no direct relief is sought; they are brought before the Court in order to bind their interests by the decree, and to make the suit perfect in its frame, according to the rule before referred to, that all parties interested in the subject of the suit, or whose rights would be affected by the decree, ought to be parties. Against these defendants, no direct relief is sought, no account, no payment, no conveyance; their personal interest in the result of the suit is concurrent, or, at least, not conflicting with that of the plaintiff, save so far as they seek to establish a claim against the plaintiff for their costs.

And in order further to lessen the delay and expense of a suit, the late Rules enable the plaintiff to bind special defendants by the proceedings, without their appearance or answer;

The provision of the late Chancery Rules with respect to these defendants, is to dispense with *subpœna* to appear and answer, and to authorize the plaintiff to serve them instead thereof with a notice, as directed by the 15th General Rule in Chancery, describing the suit by the parties' names, and its object, as regards the defendants in question; and after entering a memorandum of such service, pursuant to the 16th General Rule, the plaintiff is enabled to proceed in the cause as if the party so served were not a party thereto; and yet the party so served shall be bound by the proceedings in the cause, as if he had appeared to and answered the bill.

Provided that the plaintiff may, if he think fit, serve such defendant with *subpœna* to appear and answer, on the terms of paying the costs occasioned thereby, unless the Court shall otherwise direct.

But plaintiff may, if he will, require their answer, subject to *prima facie* liability to costs; and

Provided also, that such defendants may, if they think fit, at any time within three weeks after service of the notice, obtain an order for liberty

so also the special defendants may, if they will, appear and answer.

Or require notice of the proceedings in the cause, Subject, however, to *prima facie* liability to costs.

Infants must not be dealt with as special defendants.

But defendants out of the jurisdiction may.

And creditors by judgment or recognizance must be dealt with as special defendants.

Note the variance in this respect between the Rules in Chancery and those in the Exchequer.

In the Exchequer copy bill to be served instead of notice.

to enter an appearance in the common form, and answer the bill, on the terms of paying costs occasioned thereby, unless the Court shall otherwise direct.

Provided also, that such defendants may, if they think fit, at any time within three weeks after service of the notice, obtain an order for liberty to enter a special appearance under the 19th General Rule in Chancery, and thereupon to be served with notice of all proceedings in the cause, and to appear thereon, but upon the terms of paying costs occasioned thereby, unless the Court shall otherwise direct.

Provided also, that defendants who are infants must be served with *subpoena* to appear and answer in the ordinary way.

In case of defendants out of the jurisdiction, the Court may direct service of the notice under the 15th Chancery Order, along with the *subpoena*; and thereupon such defendants shall be considered special defendants, as if residing within the jurisdiction; see *Fulton v. D'Orsay*, 5 Ir. Eq. R. 279.

Creditors by judgment or recognizance affecting the lands the subject of suit, if not in possession, are to be considered as special defendants within the meaning of these Rules; Orders in Chancery, dated 27th March, 1843, Nos. 15, 16, 17, 18, 19, 20, 21, and 22.

The late General Orders of the Court of Exchequer in Ireland, correspond in substance with the foregoing Chancery Orders respecting parties against whom no direct relief is sought, with this difference, however, that the Court of Exchequer, instead of directing special defendants to be served with a notice, has adopted the English Rule, which requires that the special defendant shall be served with a certified copy of the bill, omitting the interrogating part, and note annexed, General Orders, Exchequer, No. 9.

The Exchequer Rule in this respect seems, on the whole, the better one; the attendance of the special defendant at the office of the plaintiff's solicitor to read the copy bill, may be very inconvenient to the parties; and although the special defendant is entitled to a copy of the bill, on payment of scrivenery fees, yet the delay of procuring this copy may render it difficult for the special defendant, within the period of three weeks after the notice served, to ascertain whether he ought to enter an appearance or not. Besides, the expense of these copies would seem more fairly payable by the plaintiff, who has the hope of being ultimately reimbursed, than by the special defendant, who has no such hope, and whose desire is to avoid litigation.

Another variance between the course of proceeding with respect to special defendants may here be noticed, although belonging to the subject of practice, rather than to that of pleading.

In the Court of Chancery in Ireland, when the special defendant shall not enter an appearance within the period of three weeks after service of notice under the 15th Rule, the plaintiff may proceed in the cause as if the special defendant were not a party thereto; Orders in Chancery, No. 17.

And in the Exchequer an or-

Whereas, in the Court of Exchequer, if the special defendant shall not enter an appearance within three weeks after service of a copy of the bill

under the 9th Order, the plaintiff may apply to the court by motion of course for leave to proceed in the cause, as if the special defendant were not a party thereto; see the Irish Exchequer Order, No. 11.

In this respect also the Exchequer Rule appears to be an improvement upon that in Chancery; the order for liberty to proceed as if the special defendants were not parties, like the order to take the bill *pro confesso*, will be read at the hearing of the cause, and thus it will appear on the face of the decree that the proper proceedings were taken as against the special defendants, as well as against the other parties to the record.

As to the form of the affidavit of service of the special defendant, the following are decisions upon the corresponding English Rule, No. 24; *Gibson v. Haines*, 1 Hare, 317; *Blew v. Martin*, 1 Hare, 150, n.(b); *Haigh v. Dixon*, 1 Y. & Col. C. C. 180; *Sherwood v. Rivers*, 2 Y. & Col. C. C. 166; *Davis v. Prout*, 5 Beav. 102.

The prayer that the special defendant, on being served with the notice, or copy of the bill, as the case may be, may be bound by the proceedings in the cause, ought to be inserted in the prayer of process; *Gibson v. Haines*, *sup.*, (1 Hare, 317).

The rule applies to amended and supplemental bills as well as to original bills, but not to bills of revivor; and if a supplemental bill be filed against special defendants, it seems necessary that the suit should be prosecuted to a decree, and therefore that there should be an answer filed by at least one defendant; for the special defendant will be bound by the proceedings, not in the original cause, to which he is no party, but in the supplemental cause; *O'Brien v. Creagh*, 6 Ir. Eq. R. 129.

If the plaintiff should treat as special defendants those from whom he ought to have required an appearance and answer, his bill will be defective for want of parties; *Marke v. Locke*, 2 Y. & Col. C. C. 500; *Adams v. Painter*, 8 Jur. 1063; and, on the other hand, if the plaintiff should require an appearance and answer from a party whom he should have dealt with as a special defendant, the costs occasioned by his so doing shall be paid by the plaintiff, unless the Court shall otherwise direct; Orders in Chancery, Nos. 15, 21; Orders in Exchequer, No. 9. What parties to a suit are to be dealt with as special defendants, is a question, therefore, demanding the Pleader's closest attention. It is easy, indeed, to give the answer furnished by the words of the Order, "those against whom no account, payment, conveyance, or other direct relief is sought." But it is not so easy to define the particular cases which do, and which do not, come within this Rule.

The principal defendants in the suit, the owners of the estate which the plaintiff seeks to sell, those between whom and the plaintiff the controversy exists, are plainly not to be treated as special defendants; *Barkley v. Lord Reay*, 2 Hare, 306; nor parties who have a legal estate, if the plaintiff seek for a sale, or a conveyance of such estate; nor prior mortgagees, if the plaintiff seek to redeem them (as to the necessity of such redemption, see *post*, p. 32; *Balfe v. Lord*, 2 Dru. & War. 480; *Rotheram v. Webb*, 4 Ir. Eq. R. 52; *Attorney-General v. Redmond*, 2 Jones, 254; *Perrott v. O'Halloran*, 2 Ir. Eq. R. 428); nor *puius* mortgagees or incumbrancers, if the plaintiff seek to foreclose them; *Adams v. Paynter*, 8 Jur. 1063; nor creditors liable to

der for liberty to proceed without the special defendant must be obtained.

Affidavit of service of notice or copy bill.

Special defendants are bound by proceedings in the cause to which they are parties only.

Parties to be treated as special defendants are;

those against whom no direct relief is sought;

not the principal defendant;

nor those who are to convey; nor those who are to be redeemed or foreclosed;

nor those who are to account; nor those whom the plaintiff seeks to deprive of their estate or interest.

But mere formal parties not required to do any act;

or those who have interests concurrent with plaintiffs;

or those who have merely equitable charges.

It may be argued that equitable incumbrancers *puisne* to plaintiff, ought not to be made special defendants, where the decree does not provide for them,

account for rents received or receivable by them, if plaintiff require such account; nor subsequent annuitants, if plaintiff seek a sale discharged of their annuities; nor any specific incumbrancers on an estate sought to be recovered by a bill in nature of an equitable ejectment; for in such case the plaintiff claims adversely to the interests of all these parties, and they among them represent the hostile claimant of the estate, the title to which is in controversy; *Marke v. Locke, sup.* (2 Y. & Col. C. C. 500).

On the other hand, formal parties, or, as they are termed, amicable defendants, who are brought before the Court merely for the plaintiff's purposes, if they have no legal estate vested in them, ought to be dealt with as special defendants.

Parties having concurrent interests with that of the plaintiff, as, for example, the other residuary legatees or next of kin, in a suit by one of them to recover his share of the residue, ought to be made special defendants, for these parties do not deny the plaintiff's title; on the contrary, they have a common title with the plaintiff, and are equally interested that the amount of the residue and their respective rights therein should be ascertained; the only object in making them defendants is to bind their interests by the decree.

Parties representing equitable charges upon an estate of which the plaintiff seeks a sale merely, and not a foreclosure, ought, generally speaking, to be dealt with as special defendants. Against them the plaintiff seeks no account, no payment, no conveyance; the object in bringing them before the Court is to bind their interests by the decree in the cause, and as those interests have no existence except in the contemplation and by the law of a Court of Equity, and can be asserted in Equity only, so they can be effectually bound and extinguished by a decree; moreover when a sale is had, pursuant to the decree, the equity of these incumbrancers is transferred from the estate sold, to the proceeds of the sale; for whether they be plaintiffs, defendants, or reported creditors, it is considered that the decree was pronounced, and the sale effected, at their instance and for their benefit; the produce of the estate, when converted into money, is distributed among the parties entitled, according to their respective rights and priorities, so that the creditors in question have interests not *conflicting* but *concurrent* with that of the plaintiff. No direct relief is sought against them, not even that they should join in the conveyance to the purchaser; for it is now held, that a purchaser under a decree is not entitled to a release of equitable incumbrances vested in parties bound by the decree; *Keatinge v. Keatinge*, 6 Ir. Eq. R. 43; *Webber v. Jones, ib.* 142.

It may be objected that the *puisne* creditors derive no benefit from a suit in which the Court will only decree a sale of a competent part of the estate for payment of the demands of the plaintiff and of prior and contemporaneous incumbrances; but where there was a surplus fund in Court produced by the sale, a subsequent incumbrancer might, independently of the late Orders, have obtained a reference to ascertain his rights in regard to such surplus; *Mackay v. Martins*, 1 Ir. Eq. R. 331; *Davis v. Rowan*, 3 Dru. & War. 478; but see *St. Antonio v. Adderly, Beatty*, 183.

And now the late General Orders provide, that in every decree hereafter to be pronounced on behalf of an incumbrancer, there shall be a direction

to report all incumbrances, and their respective priorities. The plaintiff, however, is at liberty, if necessary, to procure a separate report of his own rights, and those of incumbrancers prior to, and contemporaneous with his demand; and any surplus produce of sale under the decree shall, if the Court shall so order, be distributed among the reported incumbrancers, subsequent to those, for payment of whose demands, the sale may have been had.

but the answer is, that the *prius* creditor has an interest concurrent with the plaintiff's.

In the Court of Exchequer, the decree may, if the Court shall see fit, provide for payment of all the reported demands, or else the decree shall reserve liberty to any incumbrancer reported, and not so provided for, to apply for a further sale, provided he be entitled to have his demand raised by a sale; if not so entitled, the Court, at his instance, and for his benefit, may appoint a Receiver over the unsold land.

In the Court of Chancery, whether the decree to account bear date before or after the date of the Order, a subsequent incumbrancer may apply to the Court by petition for a further sale, if entitled to have his demand raised by a sale; otherwise the Court, at his instance, and for his benefit, may appoint a Receiver over the unsold land. See the General Orders in Chancery, No. 102, and in the Exchequer, No. 94.

It should be noticed that these Orders apply to suits by incumbrancers only, not to suits by trustees, executors, &c.

Comments on the late Rules as to decrees, No. 102, Chancery, No. 94, Exchequer.

The object of these Orders appears to have been to diminish the delay and expense of Equity litigation, by inducing creditors to come in and prove under decrees, and at the same time to do away with the injustice of binding a *prius* creditor by a decree, without providing for the payment of his demand.

Under the General Order of Chancery bearing date the 22nd of June, 1842, it was the practice to permit all creditors to prove their demands, even those subsequent to the plaintiff's demand; but as that order seems to be abolished by the sweeping words of the General Order, dated 27th March, 1843, No. 1, it seems unnecessary to discuss its provisions; see *Harvey v. Lawlor*, 3 Dru. & War. 168; *Montgomery v. Southwell*, 3 Dru. & War. 171.

Order dated 22nd June, 1842.

When a defendant objects by demurrer or plea, that the bill is defective for want of parties, the point must be disposed of before the suit proceeds further. But previous to the late General Orders, when the objection was taken by answer, the plaintiff could not have had the opinion of the Court upon the point, until the cause came on to be heard in presence of all parties, in which case the delay and expense to the plaintiff, occasioned by allowing the objection, was often a very serious injury; and, on the other hand, if the plaintiff yielded at once to the objection, and amended his bill, he incurred the risk of paying the costs of unnecessary parties.

The new Rules enable plaintiff to take the opinion of the Court upon an objection in answer for want of parties;

But now the late General Orders provide, that when a defendant shall, by his answer, suggest, that the bill is defective for want of parties, the plaintiff shall be at liberty to set down the cause for argument, as against such defendant, upon that objection only, *Bradstock v. Whatley*, 6 Beav. 451.

And if a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having taken the objection by plea or an-

And if the objection be not

made by answer, Court may decree, saving the right of the parties not before it.

Plaintiff omitting to avail himself of the late Order, now runs the risk of having his bill dismissed for want of parties.

Recent decisions as to parties.

Alterations by new Rules in the interrogating part of the bill.

Former practice.

swer, the Court shall be at liberty to make a decree saving the rights of the absent parties, *Faulkner v. Daniel*, 3 Hare, 199.

But the Court will not, under this Rule, make a decree which would prejudice an absent party, *Kimber v. Ensworth*, 1 Hare, 293-296; *Walker v. Jeffreys*, Id. 341; *May v. Selby*, 1 Y. & Col. C. C. 235; *Richardson v. Larpent*, 2 Y. & Coll. C. C. 507.

If the plaintiff should neglect availing himself of this Order, and proceed to hear his cause, notwithstanding an objection for want of parties, his bill may now be dismissed for want of parties, and liberty to amend may be refused.

The cause must be set down on the objection for want of parties within fourteen days after the answer filed, and not afterwards, without a special order; *Kershaw v. Clegg*, 1 Tur. & Phil. 120; see the General Orders in Chancery, Nos. 47, 48, and the General Orders in Exchequer, Nos. 37, 38.

The prayer of process is the part of the bill chiefly affected by these Rules as to parties; for the form of this prayer see *post*, p. 310.

Before leaving the subject of parties to a suit, the following points may be noticed.

If the plaintiff alleges by his bill and proves, that a person who, if living, would be a necessary party, is dead, insolvent, he thereby dispenses with the necessity of making the personal representative of such person a party; *Seddon v. Connell*, 10 Sim. p. 79.

If a defendant object at the hearing for want of parties, and succeed in his objection, after having admitted by his answer that there are no other parties required than those before the Court, he shall pay the costs of the day; *Price v. Berrington*, 2 Beav. 286.

A person named as a defendant, who has not answered, may be bound by the decree, with his own consent and that of the plaintiff alone; but if not named as a defendant, he cannot be so bound, without the consent of all parties in the cause; *Asbee v. Shipley*, 6 Mad. 296; *Dyson v. Morris*, 1 Hare, p. 420.

Where judgments are obtained pending the suit, against a party in the cause, the judgment creditors are not necessary parties, unless required to do some act; *Massy v. Batwell*, 5 Ir. Eq. R. 382; *Barron v. Barron*, cited Ib. 368; *Leake v. Leake*, 5 Ir. Eq. R. 361; or unless they affect the legal estate, *Parkinson v. Piper*, 8 Jur. 1111; and see *L'Estrange v. Robinson*, 1 Hog. 202, and *ante*, p. 33.

The Rules designed to diminish the length of pleadings are next to be considered. According to the practice, which existed previous to these Rules, the bill required all the defendants to answer all the matters previously mentioned in the bill, and that as fully as if the same were again repeated, and they particularly interrogated thereto, and then the bill proceeded to interrogate to the most important statements and charges, with the particular circumstances belonging to each; see *ante*, p. 19. It was not sufficient for the defendant to answer the stating and charging part of the bill, unless the answer to these parts could be framed so as also to furnish an answer to the interrogatories; nor, on the other hand, was it sufficient to answer the interrogatories alone, for the answer was open to exception.

if any material statement or charge in the bill were left unanswered, and this was the case not with regard to the principal defendants only, for the requisition to answer was usually directed in the same terms to all the defendants. The consequence was, that the record was loaded with a vast mass of matter, useless, and worse than useless, to the plaintiff, increasing materially the costs of the suit; and scarcely an answer was filed, but might have been referred, either for impertinence in answering too much of the bill, or else for insufficiency in answering too little. The omission of one interrogatory often proved a trap for an exception, so that the practice was found inconvenient both to plaintiff and defendant. It is true that the defendant was bound to answer so much only of the bill as made a case against himself; he was not bound to answer as to matters which might assist the plaintiff in procuring a decree against others, and the Courts were anxious to discourage, as far as they could, needless prolixity in pleading; see the cases cited *ante*, p. 46, and *O'Reilly v. Ward*, H. & Jones, 815.

Inconvenience thereof.

Notwithstanding efforts to discourage prolixity.

The Court of Exchequer, too, had, by the General Order of the 1st of December, 1836, directed that the plaintiff should, at the time of service of *subpœna* to appear and answer, also serve notice on such of the defendants (if any) as were made parties as formal defendants, stating the right in which they were made parties, and also if any defendant was made party as a trustee, stating whether the co-trustee, or *cestuique trust* of such defendant were parties defendants; and by such notice the plaintiff was to inform any such defendant, that he was not required to answer the bill at length, but merely to admit or deny the fact of his being trustee, or the other formal matter with which he was charged, and the plaintiff, by such notice, was to offer to consent that such answer be received without oath, and if the defendant was one of two or more trustees, all were to be required to join in one formal answer, upon pain of losing costs of answer and paying plaintiff costs unnecessarily incurred thereby, and trustees who might have answered jointly, answering separately were not to have their costs, &c.; but, subject to the foregoing observations, a defendant was bound, previous to the late General Rules, to answer every matter in the bill, which could be of the least use in enabling the plaintiff to procure a decree against him, and if the defendant submitted to answer at all, he was compelled to answer fully every matter which was material, and which would not have subjected him to forfeiture, or to a breach of professional confidence; *Jones v. Pugh*, 12 Sim. 470.

Defendant answering must have answered fully;

The case of a purchaser for valuable consideration without notice, was at one time considered an exception to the rule, but afterwards it was settled otherwise; *Hare on Discovery*, 256; *Tipping v. Clarke*, 2 Hare, p. 392; *Lancaster v. Evora*, 1 Ph., 349.

The plaintiff himself frequently increased the length, or rather the number of the pleadings by pressing for answers from defendants who could not be expected to make any useful discovery. Indeed in the Court of Exchequer, until the late General Orders, the bill could not be taken as confessed, or rather a decree on sequestration, as it was termed, could not be procured, until process to a sequestration was entered against the

And even formal defendants were made to answer;

defendant for want of his appearance or answer, and such process is still necessary in suits to foreclose in mortgage cases, under the Statute of the 7 Geo. 2, c. 14, and suits to perpetuate the testimony of witnesses, under the Statute of the 13 Geo. 2, c. 9 ; General Orders in Exchequer, Nos. 19, 22.

Defendants answered long statements though unable to give any information.

Recent Rules direct interrogatories, &c., to be divided and numbered ; and defendant bound to answer such only as he is required to answer.

The defendant too sometimes added very uselessly to the length of the record, by answering at length those statements in the bill of which he was altogether ignorant.

According to the provisions of the late General Orders :

1. The interrogatories, and in the Exchequer, the statements also in the bill shall be divided as conveniently as may be, and numbered consecutively.

2. The interrogatories, and in the Exchequer, the paragraphs also, which each defendant is required to answer, shall be specified in a note at foot of the bill, which note shall be considered as part of the bill ; see the General Orders in Chancery, Nos. 12 and 13, and in the Exchequer, Nos. 6 and 7.

3. The bill shall no longer require the defendants to answer the entire bill, but shall require each of the defendants to shew cause, if he can, why plaintiff should not have the relief prayed by the bill ; in other words, to state his defence, and to answer such of the interrogatories, and, in the Exchequer, such of the paragraphs also, as by the note at foot of bill, the defendants respectively are required to answer ; General Order in Chancery, No. 14, and in the Exchequer, No. 8.

4. A defendant in the Court of Chancery, is no longer bound to answer any statement or charge in the bill, unless interrogated thereto, and a defendant in Chancery shall not be bound to answer any interrogatory except those he is in manner aforesaid required to answer ; General Orders in Chancery, No. 45.

A defendant in the Court of Exchequer is no longer bound to answer any statement, charge, or interrogatory in the bill, unless those he is in manner aforesaid required to answer ; General Order in Exchequer, No. 35.

Defendant must not answer by stating his ignorance of matters he is not required to answer.

Defendant may by answer decline answering.

5. A defendant in either Court is no longer at liberty to answer any statement or charge by stating his ignorance thereof, unless he be interrogated thereto, or, in the Exchequer, unless he be required, by the note at foot of the bill, to answer such statement or charge ; General Orders in Chancery, No. 45 ; in Exchequer, No. 35.

6. A defendant may now, by answer, decline answering any interrogatory, and in the Exchequer any statement also, from answering which he might have protected himself by demurrer ; General Order in Chancery, No. 45 ; Exchequer, No. 36.

But still a defendant must answer fully, save so far forth as he may be enabled to protect himself by demurrer. If he is under the necessity of relying on new matter, not appearing on the bill, the defendant must plead, or else answer fully.

Plaintiff shall not unnecessarily enforce answers.

7. The plaintiff shall not, in any case, issue a writ of attachment, or sequestration, to enforce the answer of a defendant, unless the purposes of the suit cannot be obtained by taking the bill as confessed against him,

nor, in the Court of Exchequer, unless an affidavit to that effect shall have been previously filed; General Orders in Chancery, No. 43; in Exchequer, No. 32.

Upon the foregoing Orders the following observations may be made. A defendant must file at least a formal answer, although his name be omitted in the note at foot of the bill, *Wilson v. Jones*, 12 Sim. 361.

It is not necessary to prefix a number to each separate interrogatory, or, in the Exchequer, to each separate paragraph, but merely to divide them into batches, as conveniently as may be; and a defendant called on to answer a paragraph or interrogatory, of a specified number, must answer all that is included under that number, *Boutcher v. Branscombe*, 5 Beav. 541.

It is proper to number the interrogatories though there be only one defendant, for it has been held that where there is a sole defendant in Chancery, he is not bound to answer any statement or charge in the bill unless interrogated thereto; *Lynch v. Lecesne*, 1 Hare, 626; *Millar v. Millar*, 6 Ir. Eq. R. 308; *Hughes v. Lipscombe*, 3 Hare, 341. But see 5 Beav. 545.

As a matter of prudence also, it seems right, even in the case of a sole defendant, to number the interrogatories, for it may be necessary to amend by adding parties, which amendment would be facilitated by the previous division of the interrogatories.

Where the interrogatories are not properly numbered the Court will stay proceedings until the General Order has been complied with; *Boutcher v. Branscombe*, *sup.* (5 Beav. 541.)

In some cases bills filed in violation of the General Orders will be taken off the files of the Court, *Tommey v. White*, 6 Ir. Eq. R. 303.

It may be useful to observe, that although a defendant is not bound to answer any statement or interrogatory which he is not required by the bill to answer, still, if by answering such matter he conceives that he will strengthen his defence, he is at liberty so to do, with this restriction, that he must not answer as to matters to which his answer is not required, by merely stating his ignorance thereof.

Again, these Rules do not oblige a defendant to answer an interrogatory that is irrelevant, or immaterial; General Orders in Chancery, No. 79; or which is not founded on some statement or charge in the bill.

In dividing the interrogatories, and the paragraphs, when necessary, the Pleader should have regard to the requisition at the foot of the bill, so as to throw together those interrogatories or those paragraphs which each respective defendant will be required to answer; and so as not to connect the interrogatories designed for one defendant, with those which are intended for another.

In framing the note or requisition at foot of the bill, the Pleader must consider the case made by the bill against each of the defendants; in other words, he must see what is to be proved, if not admitted by the defendant, in order to entitle the plaintiff to a decree against that defendant.

The principal defendants must of course be required to answer all the material statements and charges in the bill; every thing, in short, which, if

Recent decisions in relation to these new Rules.

1. Defendant against whom Process is prayed must answer.

2. Interrogatories may be divided into batches.

3. The bill should be divided and numbered, even in case of a sole defendant.

4. If the Rules be not complied with proceedings will be stayed.

Observations on Rules as to interrogatories.

Defendant may answer matters he is not required to answer.

Defendant not bound to answer an interrogatory immaterial.

Suggestion as to dividing the bill.

Suggestion as to framing the note at foot of the bill.

With regard to the principal defendants.

not admitted, the plaintiff must prove, in addition to the usual interrogatories intended to furnish the plaintiff with such information as to the estate or fund in question, as will assist in prosecution of the suit.

Creditors.

The creditors and incumbrancers who are made answering parties should be interrogated as to the facts which constitute the plaintiff's title, as well as to those which relate more properly to the defendants themselves, and which shew the propriety of their being made parties: they may also be questioned as to the custody of title deeds, or documents relating to the estate, or subject of controversy.

Infants.

Infant defendants may be interrogated as to the facts which shew that they are properly made defendants, but not as to the plaintiff's title; for their answer cannot be read in evidence against them, so that their admissions will not dispense with the plaintiff's proofs: for example, if the bill were filed to foreclose a mortgage, and the party entitled to the equity of redemption were under age, it would be needless to insert the interrogatories, as *ante*, pp. 65, 66. Such defendant should be required only to answer as to the allegations which shew that he is the owner of the equity of redemption.

The foregoing observations lead us further to remark, that the effect of the late General Orders is, in some respects at least, to increase the difficulty of drawing a bill in equity. The Draughtsman must now study his bill with the same anxious attention as if he were engaged in that which is perhaps the most important and the most difficult part of the duty of an Equity Practitioner, namely, advising the proofs to be made against each of the defendants. In Chancery, especially, he must repeat in the form of an interrogatory every material charge; and in both Courts, he must, by the note at foot of the bill require from each defendant an answer to so much of the bill as will entitle the plaintiff, when the cause shall be at hearing, to a decree against that defendant.

FORM TO PRECEDE INTERROGATING PART OF BILL, IN CHANCERY.

To the end, therefore, that the said defendants may, if they can, shew why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say :

1. Whether, &c.
 2. Whether, &c.
-

Form to precede interrogating Part of Bill in Exchequer.

To the end, therefore, that the said defendants may, if they can, shew why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several paragraphs or interrogatories herein contained as are pointed out by their respective numbers in the note hereunder written, to be answered by each defendant respectively, that is to say :

Paragraphs, Nos. 1, 2, &c.

Interrogatories, Nos. 4, 5, &c.

Prayer of Process, and that special Defendants may be bound, in Chancery.

May it please your Lordship to grant unto your orator, Her Majesty's most gracious writs of *subpœna*, to be directed to the said John Jones, James Scott, and William Smith, and their confederates, when discovered, thereby commanding them and every of them, at a certain day, and upon pain of process against them respectively for their neglect, to cause an appearance to be entered for them respectively, in this honourable Court, to this your orator's bill of complaint, and then and there, full, true, direct, and perfect answer make to all and singular the premises, and further to stand to perform and abide such further order, direction, and decree therein, as to your Lordship shall seem meet.

And may it further please your Lordship, that the said (*special defendants*), upon being served with the notice mentioned in the fifteenth General Order of this honourable Court, may be bound by the proceedings in this cause, and your orator shall ever pray, &c.

A. B. [*counsel's signature.*]

Prayer of Process, and that Defendants may be bound, in Exchequer.

[*The form of prayer of subpœna is the same as in Chancery, substituting only "Lordships" for "Lordship," and the prayer that defendants may be bound is as follows*]:

And may it further please your Lordships, that the said [*special defendants*], upon being served with a copy of this your orator's bill of complaint, pursuant to the ninth General Order of this honourable Court, may be bound by the proceedings in this cause, and your orator shall ever pray, &c.

A. B. [*counsel's signature.*]

Notice pursuant to the 15th General Order of the Court, dated the 27th Day of March, 1843(a).

In Chancery.

William Jones,

Plaintiff.

John Styles,

James Smith,

William Smith, and

John Scott,

Defendants.

Take notice that the bill in this cause was filed on the 1st day of November, 1844, for the purpose, among other things, of(b) raising the amount of a judgment obtained by the plaintiff against the defendant, John Styles, for the sum of £500, besides costs, in Her Majesty's Court of Exchequer in Ireland, in or as of Michaelmas Term, 1841, and

for a sale of the lands of *Grange*, of or to which the said defendant, John Styles, is seised or well entitled for an estate of inheritance.

And you are hereby informed that you are at liberty to inspect a copy of the said bill, in the hands of John Molloy, of No. 20, Molesworth-street, Dublin, the plaintiff's Solicitor in this cause. And take notice, that the said bill prays, among other things, that you, on being served with this notice, may be bound by the proceedings in the cause, pursuant to the 15th General Order of the 27th day of March, 1843; and you will be accordingly bound by all the proceedings in the cause, as if you had appeared to and answered the said bill, unless within the period of three weeks from the service hereof, you shall enter an appearance in the same manner as if you had been served with a *subpœna* to appear to, and answer the said bill, or a special appearance, pursuant to the 19th General Order of the 27th day of March, 1843. Dated this 5th day of November, 1844.

A. B.(c)

JOHN MOLLOY,

Solicitor for plaintiff, 20, Molesworth-st.

To the defendant, John Scott.

N. B.—This notice is to be served in same manner as the *subpœna*.

(a) Cannot be served on an infant.

(b) State the object of the suit, so far as the person served with this notice is concerned.

(c) Signature of counsel, who shall have signed the said bill.

Y

Form of Certificate and Notice to be endorsed on Copy Bill in the Exchequer, in the Handwriting of Plaintiff's Attorney, and served on special Defendants, pursuant to the ninth General Rule.

I hereby certify that the within is a true copy of the bill filed in this cause [omitting only the interrogating part and note at foot of it], and take notice that you are herewith served in order that you may appear to such bill, if you shall think fit, according to the 12th and 13th Orders of this Court, made the 22nd day of January, 1844, but that your appearance is not required by the plaintiff.

C. D.,
Plaintiff's Attorney.

BILLS BY JUDGMENT CREDITORS TO RAISE THE AMOUNT SECURED BY THEIR JUDGMENTS IN THE LIFE-TIME OF THE CONUSOR.

PRELIMINARY DISSERTATION.

CONTENTS:

<i>Rights of Judgment Creditors prior to "Pigot's Act."</i> <i>Present Rights of Judgment Creditors.</i> <i>Effect of charging Section of "Pigot's Act."</i> <i>Purchaser taking legal Estate how far affected thereby.</i> <i>Docketing Act.</i> <i>"Moore's Act."</i> <i>Act for registry of Judgments.</i> <i>Statutes of Limitation.</i> <i>Effect of, how avoided.</i> <i>Period from which the Bar of the Sta- tute begins to run.</i>	<i>Effect of Revivor.</i> <i>Effect of Decree.</i> <i>3 & 4 Will. IV. c. 27.</i> <i>Effect of "Trust for Payment of Debts."</i> <i>Act for Assignment of Judgments.</i> <i>Judgments, how far affected by Act for Registry of Deeds.</i> <i>Present Rights of Judgment Creditor under 3 & 4 Vict. c. 105, s. 23.</i> <i>How enforced.</i> <i>Interest on Judgments.</i> <i>Money Orders, Decrees, &c.</i> <i>Frame of Bill.</i>
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THE right of a judgment creditor to file a bill to raise the amount of his judgment debt in the life-time of the conusor, is founded altogether upon the 22nd section of the 3 & 4 Vict. c. 105, commonly called "Pigot's Act." See *ante*, p. 39.

Prior to, and independently of that Statute, as we have had occasion to observe, *ante*, p. 36, the judgment creditor had no specific lien upon the lands of his debtor, nor was he considered as a purchaser, for his money was not advanced upon the immediate view or contemplation of his debtor's real estate. By the common law he might have satisfaction of the goods of his debtor, or of the growing profits of his lands. The Statute Westm. 2, enabled him to obtain actual possession of one-half of his debtor's lands; so that the judgment creditor might issue execution against the person or personal estate of the debtor, or else extend his real estate under an *elegit* issued on the judgment, 2 Crui. Dig. 50, (3rd ed.); and if unable to recover

Rights of judg-
ment creditors
prior to "Pi-
got's Act."

possession by ejectment of a moiety of his debtor's lands, by reason of outstanding terms or other temporary bars, he might have filed his bill for the purpose of recovering that which he might have had at law, but for the legal impediments, *Neate v. Duke of Marlborough*, 3 Myl. & Cr. 407; and by force of the very beneficial Act, called "the Sheriff's Act," he might obtain a Receiver over the entire lands of his debtor, not already in the possession of prior incumbrancers; *Smith v. Egan*, Sausse & Sc. 238. If the estate of the conusor were mortgaged, the judgment creditor might redeem the mortgage, *Tunstall v. Trappes*, 3 Sim. 300, and thus acquire the same rights that the mortgagee possessed, including a right to sell a competent part of the estate for payment of the mortgage debt, and prior and contemporaneous charges; and if any surplus should remain after payment of the mortgage, the judgment creditor might file a bill to attach such surplus; *Crofts v. Poe*, 1 Jones, 540; and see *Mackay v. Martins*, 1 Ir. Eq. R. 331.

After the death of the conusor, the judgment creditor, according to the practice in Ireland, might have filed a bill for an account of the real and personal estate of his deceased debtor, and of the sum due for principal, interest, and costs, on foot of the judgment, and for a sale of the entire real estate, *Barnewall v. Barnewall*, 3 Ridg. P. C. 62; 1 Mol. 322; *Ib.* 569; 2 Sch. & Lef. 19.

In this state of the law the judgment creditor, from the date of the rendition of his judgment, had a potential, though not an actual charge upon freehold property; see 4 Ir. Eq. R. 504; 3 Myl. & Cr. 407; and the lien of the judgment so far bound the land of which the debtor was seised at the time of entering up the judgment, or which he afterwards acquired, that no subsequent act of the debtor, not even an alienation for valuable consideration without notice, could avoid it; 2 Cru. Dig. 51 (3rd ed.)

The state of the law with respect to judgment creditors, prior to the Statute 3 & 4 Vict. c. 105, shews the necessity that existed for the intervention of the Legislature in behalf of such creditors, in order to give them more effectual remedies against the real and personal estate of their debtors than they possessed under the then existing law.

1. The judgment creditor could extend a moiety only of his debtor's lands.

2. Trust estates of the debtor which were subjected to execution by the Statute of Frauds, 7 Will. III. c. 12, s. 7, Ir. (corresponding to the 29 Car. II. c. 3, s. 10, Eng.), were bound by the judgment, not from the rendition, but only from the time of suing out execution, and therefore, the creditor's remedy was defeated by alienation of the trustee before execution sued, *Harris v. Pugh*, 4 Bing. 335; 2 Sug. Vend. 385 (10th ed.)

3. Terms for years of the debtor were likewise bound by the judgment, not from the rendition, but only from the time execution was sued out and delivered to the sheriff, 2 Sug. Vend. 393 (10th ed.); *White v. White*, 1 Jones, 610.

4. Ecclesiastical benefices were also bound by the judgment, not from the rendition, but only from the time of issuing the writ of sequestration,

Sterling v. Wynne, 1 Jones, 63; *Wise v. Beresford*, 3 Dru. & War. 276; S. C. 5 Ir. Eq. R. 407.

5. Even where the debtor was seised of land at the rendition of the judgment, the remedy of judgment creditors was often defeated by the retrospective operation of appointments under a power; for example, where the lands had been limited to such uses as the debtor should appoint, and for default of appointment, to himself in fee; in such case the appointee took under the instrument creating the power, and consequently the effect of the appointment was to overreach, and displace the lien of judgments intervening between the creation and the execution of the power, *Doe v. Jones*, 10 B. & Cr. 459; and notice to the appointee of a lien which the Law thus enabled the debtor to defeat, did not give the judgment creditor a title to the aid of Equity, *Skeeles v. Shearly*, 3 Myl. & Cr. 112; 2 Sug. Vend. 392 (10th ed.); 5 Jar. Byth. 45 (3rd ed.)

But now, by the operation of the 3 & 4 Vict. c. 105, the judgment creditor may extend:

Present right
of judgment
creditors.

1. The entire of his debtor's lands, &c.

2. Trust estates of or to which the debtor was seised, possessed, or entitled, at the time of the *rendition of the judgment*, or at any time afterwards.

3. Terms of years of which the debtor was possessed at the time of *entering up* the judgment, or at any time afterwards.

4. Ecclesiastical benefices of the debtor from the like period of the rendition of the judgment.

5. Lands, &c. over which the debtor at the time of the rendition of the judgment, or at any time afterwards, had a disposing power which he might, without the assent of any other person, exercise for his own benefit; sec. 19; and the judgment creditor has an actual charge on all the lands of his debtor, including his chattels real (2 Sug. Vend. 10th ed. 401; 1 Dru. & War. 182), trust estates, estates tail, estates in joint tenancy, and estates over which the debtor has a sole disposing power; sec. 22.

The charge created by this Act is not a mere general charge; but a specific lien; if a man has power to charge lands, and agrees to charge them, in Equity he has actually charged them, and a Court of Equity will execute the charge; and the enactment of the 22nd section is, that a judgment shall operate as a charge upon all lands, &c., of which the consor at the time of entering up such judgment, or at any time afterwards, shall be seised, possessed, or entitled, for any estate or interest in possession, reversion, remainder, or expectancy, or over which such person shall have any disposing power for his own benefit, and "*that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of said Act, or any part thereof, as he would be entitled to in case the person against whom such judgment should have been so entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest thereon.*" (See *Digby v. Irvine*, 6 Ir. Eq. R. 149).

The charging
section of "Pl-
got's Act;"

This enactment seems quite sufficient to authorize the judgment creditor Enables the

creditor to file bill for sale in life of conusor (as if the conusor had by his own act agreed to charge the same), of all his debtor's lands, &c. including chattels real, trust estates, estates in reversion, and advowsons.

to file a bill for a sale of real estate in the life of the conusor, and many such bills have been accordingly filed.

But the equitable charge created by this section of the Statute can be enforced in a plenary suit alone; and not by petition under "the Sheriff's Act;" *Fletcher v. Steele*, 6 Ir. Eq. R. 376.

The words used in this section of the Statute, describing the property upon which the judgment shall operate as a charge, are very extensive, viz.: all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments of or to which the conusor shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled, for any estate or interest whatever, at Law or in Equity, whether in possession, reversion, remainder, or expectancy.

The judgment creditor may, therefore, file a bill for sale of his debtor's advowson.

So, if a judgment be obtained against a Rector, the creditor may file a bill for a Receiver, making the Ordinary a party defendant; *M'Curdy v. Chichester*, 2 Jones, 358.

It is no longer material as between vendors and purchasers, whether the seller has an equitable or a legal estate, or whether or not the legal estate has been transferred before execution sued, or whether the seller has a general power or an estate, for in any of the foregoing cases the judgment is equally binding.

There are five provisos annexed to the 22nd section of this Act; see p. 40, *ante*.

But not before the judgment is one year old.

The effect of the first proviso is this, that a judgment creditor may not file a bill to enforce his judgment as an actual charge under this section, until the judgment is at least a year old; but he may within the year avail himself of the remedies he would have had if the Act had not passed; and it would seem that this proviso does not interfere with the creditor's right to extend all his debtor's lands, &c. under the 19th section of the Act.

In case of bankruptcy of conusor, judgments *in invitum* are unaffected by this Act, unless a year old at the bankruptcy.

The effect of the second proviso is this, that in case of the bankruptcy of the conusor, the judgment creditor shall have no preference by force of the charge created by this Act, unless the judgment were at least a year old at the time of the bankruptcy.

As the law stood prior to the late Bankrupt Act, judgments entered or obtained subsequently to the bankrupt having become a trader, were by the bankruptcy levelled with simple contract debts; and by the late Bankrupt Act, 6 Will. IV. c. 14, s. 126, as amended by the Statute 2 & 3 Vict. c. 86, judgments by default, confession, or *nil dicit*, entered subsequently to the trading, are levelled by the bankruptcy; and the circumstance of the trader having subsequently mortgaged the lands that were subject to the judgment, makes no difference; *White v. Baylor*, 5 Ir. Eq. R. 400. So that this proviso can only apply to judgments other than those obtained by default, confession, or *nil dicit*; *In re Perrin*, 2 Dru. & War. 147.

As regards purchasers and creditors, including those by simple

The effect of the third proviso is clearly stated in the words of the proviso itself, viz.: that as regards purchasers, mortgagees, or creditors, who shall have become such before the commencement of the Act (1 Nov. 1840),

the judgment shall not affect lands, &c. otherwise than as the same would have been affected thereby, if the Act had not passed.

The word *creditors* in this proviso includes simple contract creditors; *In re Perrin, supra*, 2 Dru. & War. 147; S. C. 4 Ir. Eq. R. 89, 162. Upon this proviso a question has been raised, whether a judgment creditor can maintain a bill to sell the estate in the life-time of his debtor, without offering to redeem not alone prior judgments, but also judgments subsequent to the plaintiff's, confessed before the 1st November, 1840.

On the part of the judgment creditors, it is urged, that by a sale of the estate in the life of the debtor, and by distributing the purchase money according to priority of incumbrances, if the fund will not reach their demands, they are deprived of their chance of recovering the amount due, by extending the lands, or by obtaining a Receiver under "the Sheriff's Act;" a chance which is increased by the provisions of "the Sheriff's Act" securing to a *puius* creditor a fund realized by his diligence (5 & 6 Will. IV. c. 55, s. 38), and by the recent decisions which treat a fund in Court, or in the hands of a Receiver appointed at the instance and in the suit of a judgment creditor, as if it had been received by the judgment creditor himself, when in possession under an *elegit*, and which therefore the judgment creditor shall be paid, notwithstanding claim made by a prior specific incumbrancer; *Morrogh v. Hoare*, 5 Ir. Eq. R. 195.

On the other hand, it is insisted, that when the land is converted into money, the *puius* creditor gets the full benefit of his judgment by having the purchase money applied, so far as it will extend, in payment of the incumbrances, and that he is given the full benefit of this proviso when each judgment is dealt with as an incumbrance upon the produce of the sale of the land, in the same way as the land would have been affected by it if the Act had not passed.

This question was raised in a recent case in Chancery, *Vincent v. Going*, Ch. T. Term, 1844, MS., and it was held, that the judgment creditor waived the objection by permitting a decree to account; unquestionably the creditor has a right to insist that he should not be prejudiced, 2 Dru. & War. 161; Flan. & K. 427; but the Court would probably struggle against an objection of this kind, unless it appeared that the *puius* creditor would in fact be injured; even in the case of a mortgagee brought before the Court by a subsequent incumbrancer, though it is clear that the latter has not the right by his suit to deteriorate the security of the former, yet the Courts rather lean against the prior creditor insisting that the bill should be dismissed; see *Rotheram v. Webb*, 4 Ir. Eq. R. 58; *Balfe v. Lord*, 2 Dru. & War. 480; S. C. 4 Ir. Eq. R. 648; *Perrott v. O'Halloran*, 2 Ir. Eq. R. 428; and see *ante*, p. 32.

The fourth proviso is this, that nothing in this Act shall be deemed or taken to alter or affect any doctrine of Courts of Equity whereby protection is given to purchasers for valuable consideration without notice.

Some of the leading principles of Equity respecting the nature and effect of notice, whether actual or constructive, have been already (*ante*, pp. 42, 43, and 44) incidentally observed upon.

contract prior to the 1st November, 1840, judgments affect lands, &c. as if the Act had not passed.

Q^u. therefore whether judgment creditor filing bill in life of consor ought to offer to redeem judgments confessed before 1st Nov. 1840.

Purchaser taking the legal estate is not bound by a judgment of which he had no notice;

Nor by any equitable incumbrances of which he had no notice, unless created by a deed registered before his own.

The general rule is, that purchasers for valuable consideration who have the legal estate, are protected against a prior equitable incumbrance of which, at the time of completing their purchase, they had no notice.

And so in case of purchasers having a preferable right to call for the legal estate; but the purchaser must prove payment of his purchase money; *Molony v. Kernan*, 2 Dru. & War. 31.

In Ireland this general rule is subject to an exception in the case of purchasers procuring a conveyance of the legal estate, without notice of a prior equitable instrument, supported by a valuable consideration, and duly registered under the Irish Registry Act (6 Ann. c. 2); for in such case the question of priority between the rival purchasers is determined, not, as it would be in England, by possession of the legal estate, nor yet by date of execution of the deeds, but by the date of their registration; *Bushell v. Bushell*, *sup.* (1 Sch. & Lef. 90); 1 Sch. & Lef. p. 373; 1 Dru. & War. pp. 485, 486; and see *ante*, p. 42.

The qualification of the English Act, 11 & 2 Vict. c. 110, corresponding to this proviso, seems to be that contained in the Statute 2 & 3 Vict. c. 11, s. 5, which provides that no judgment, &c. although duly registered, shall, as against purchasers without notice thereof, affect lands, or any interest therein, otherwise than a judgment duly docketed would affect such lands prior to the 1 & 2 Vict. c. 110.

Thus a purchaser of a chattel interest is protected from a judgment confessed by the vendor, of which the purchaser had no notice, unless prior to the sale the judgment creditor has lodged his writ of execution in the Sheriff's Office; and the purchaser can still protect himself from judgments of which he has no notice, by taking an assignment of a prior legal term to attend the inheritance; 3 Sug. Vend. 28, 29, (10th ed.); and by means of an appointment under a power the purchaser can still protect himself from judgments intervening between the creation of the power and the appointment, if he had no notice of the judgments, as he might before the Act even though he had such notice.

The proviso in question is, no doubt, a safeguard to purchasers, but it is not wise to rely on it, for notice may be proved by slight circumstances; see *ante*, p. 42; and see 3 Sug. Vend. 453, *et seq.* (10th ed.); Wal. Rep. by Lyne, 249; 4 Beav. 18; 1 Y. & Col. (Ex.) 328; 1 Hare, 43. And if the judgment creditor can fix the purchaser with notice, he may take the lands, &c. in execution by legal process, and avail himself of the extensive remedies which are now given to judgment creditors against the property of their debtors, without resorting to a Court of Equity to set aside the conveyance or assignment of the legal estate.

It has been decided that a purchaser obtaining the legal estate, without notice of a judgment entered against his vendor while the legal estate was outstanding, will not be bound thereby, *Chapman v. Dunbar*, *sup.* (3 Ir. Eq. R. 202); *Hunt v. Coles*, *sup.* (Comyn. R. 226); unless previously to his purchase the judgment creditor had issued execution; and this would be so held notwithstanding the Statute 3 & 4 Vict. c. 105 (ss. 19 and 22), which makes the judgment operate as a charge on the lands of the conusor,

from the time, not of suing execution, but of entering the judgment; for the judgment creditor would have no remedy at law, and this fourth proviso preserves to the purchaser the protection to which he is entitled in a Court of Equity, in cases unaffected by the Irish Registry Act, against a prior equitable incumbrance of which he had no notice.

The effect of the fifth and last proviso is, to preserve to the judgment creditor every remedy he might have had for recovery of his debt, if the Act had not passed.

The object of the Statute was to improve the security of a judgment, and to extend the remedies of a judgment creditor, without at all prohibiting any proceeding he might have resorted to independently of this Statute.

But the intention of the Legislature seems to have been rather to enlarge the remedies of a judgment creditor in proceeding against property previously subject to his demand, than to make property liable to execution which would not be so independently of this Act; see 6 Ir. Eq. R. p. 155.

The words used in the Statute of Frauds in respect to trust estates thereby made extendible, are so similar to those used in the 3 & 4 Vict. c. 105, s. 19, that the question as to what trust estates are extendible, may be considered unaffected by the latter Statute. A trust estate would not be extendible under the late Act any more than under the Statute of Frauds, unless it were a clear and simple trust, and for the sole benefit of the debtor, *Doe v. Greenhill*, 4 B. & Ald. 684; 2 Sug. Vend. 387 (10th ed.) Again, an equity of redemption was not within the clause of the Statute of Frauds, and it was not therefore extendible, 2 Sug. Vend. 384 (10th ed.); *Lyster v. Dolland*, 1 Ves. Jun. 431; and for the reasons before stated, it would seem that an equity of redemption is not made extendible by the Statute 3 & 4 Vict. c. 105. The *elegit* gives a legal estate, which it cannot do if the legal estate be outstanding in an unpaid mortgagee.

At common law the judgment related back to the first day of the term Docketing Act. in or as of which it was entered, so that all the judgments of that term were considered by this fiction of the law as having been entered on the first day of the term; consequently, conveyances executed subsequently to the first day of the term were postponed to all the judgments of that term; and the law is still so in respect to voluntary conveyances, for as against volunteers, the judgment takes effect as from the first day of the term as of which it is entered; 1 B. & P. 307; 6 T. R. 384; 1 Mol. 315. But the Statute 3 Geo. II. c. 7, Ir., takes away the effect of this relation as against purchasers *bonâ fide*, for valuable consideration.

In this respect the Irish Act differs from the English Docketing Act, 29 Car. II. c. 3, s. 14, by force of which latter Statute the nondocketed judgment is not postponed merely, but reduced to the rank of a simple contract debt; *Leahy v. Dancer*, 1 Mol. p. 320.

By the Statute 9 Geo. IV. c. 35, commonly called "Moore's Act," judgments entered prior to 27th day of June, 1808, are void against purchasers if not revived or redocketed under the Act before the 27th day of June, 1833 (sec. 3). *Sed vide* *Geraghty v. Abbot*, MSS., Exch., M. T. 1844.

Judgments entered in the interval between the 27th day of June, 1808, and the 27th day of June, 1828, are void against purchasers, unless revived or redocketed under the Act within twenty years next before the purchaser's conveyance (sec. 21); and this is so although the purchase was made prior to the 27th day of June, 1828; *Knox v. Kelly*, 1 Dru. & Wal. 542. Modern judgments entered since the 27th day of June, 1828, shall be void against purchasers after twenty years from the entry thereof, unless revived or redocketed within twenty years next before the conveyance to the purchasers. See also *Hickson v. Collis*, 1 Jones & L. 94.

If the judgment be revived, though not redocketed within the required period, the purchaser would be bound by the judgment, provided it were entered pursuant to the Statute. The better opinion seems to be that notice of an undocketed judgment does not make it binding on a purchaser; see *ante*, pp. 41-5; and see *Garnett v. Armstrong*, 5 Ir. Eq. R. 533; S. C. 2 Con. & Law. 455; *Cockburne v. Wright*, 6 Ir. Eq. R. 1. A judgment twenty years old at date of the Act, though revived five years prior to the Act, but not redocketed or revived and entered within five years after the Act, was held to be void against a subsequent mortgage; *Stewart v. Cottingham*, 6 Ir. Eq. R. 248.

Act for registry
of judgments.

The Statute 7 & 8 Vict. c. 90, s. 1, enacts, that after the 1st day of November, 1844, the books for docketing under the said Statute 3 Geo. II., and the books for redocketing and entering under the said Statute, 9 Geo. IV. c. 35, shall be finally closed, without prejudice to the operation of docketings or redocketings under said Acts up to that time.

Section 2. Judgments obtained prior to the 1st day of November, 1844, and which on or before that day have not been redocketed or entered under "Moore's Act," shall not, after the 1st day of November, 1845, affect lands, &c. as to purchasers, mortgagees, or creditors, until registered under this Act; and judgments obtained after the 1st day of November, 1844, shall not affect lands, &c. as to purchasers, &c. until registered under this Act.

Section 3. The registration of decrees, rules, and orders, directed by 3 & 4 Vict. c. 105, s. 28, shall be made by the officer under this Act.

Section 4. Rules and orders, &c. shall not affect lands, &c. as to purchasers, &c. until registered under this Act.

Section 6. Judgments redocketed or entered under "Moore's Act," shall after twenty years from the redocketing or entry, be void against lands, &c. as to purchasers, until registered under this Act, and so, *toties quoties*.

And judgments, decrees, rules, or orders registered under this Act shall, after twenty years from such registration, be void against lands, &c. as to purchasers, &c. until re-registered under this Act, and so, *toties quoties*.

Section 7. Provided that the original entry under "Moore's Act," or this Act, shall bind purchasers or mortgagees who claim under a deed or instrument executed within twenty years from such entry, and shall bind creditors whose rights shall accrue within the said period of twenty years from such entry; but no purchaser or mortgagee shall be affected by a judgment or rule not registered or re-registered within twenty years before ex-

execution of the deed or instrument under which such purchaser or mortgagee claims.

Section 8. Judgments, decrees, &c. registered or re-registered, shall not affect purchasers without notice more extensively than they would have done previously to the Act 3 & 4 Vict. c. 105.

Section 9. Neither this Act, nor the Act 3 & 4 Vict. c. 105, shall revive judgments already barred, or affect them as between the parties, their representatives, or volunteers claiming under them.

Section 10. *Lis pendens* shall not affect purchasers without express notice thereof, unless and until registered under this Act.

Section 11. Recognizances and crown bonds shall not affect lands, &c. as to purchasers, until registered.

This Statute will greatly facilitate the transfer of property, by diminishing the trouble and expense of searches. A purchaser will now by a search for twenty years back, find in one and the same office all the judgments, recognizances, crown bonds, decrees, and orders, which can affect the lands, as against such purchaser.

The right of a judgment creditor to enforce his demand is so often barred by the Statutes of Limitation, that the observations on this head, *ante*, p. 45, appear scarcely adequate to the importance of the subject. Statutes of Limitation.

Independently of any Statute, a judgment might, from lapse of time without recognition of the debt, be presumed to have been satisfied. Twenty years has been held a period sufficient for this purpose; *Grenfell v. Girdlestone*, 2 Y. & Col. (Ex.) 662; 1 Camp. 27; or even a less time if the parties settled a general account without referring to the judgment debt; *Oswald v. Legh*, 1 T. R. 270. The presumption might, of course, have been rebutted by evidence, but it has been held that the incapacity of the debtor to pay was not sufficient to repel the presumption; *Willaume v. Gorges*, 1 Camp. 217. Payment of judgment debt may be presumed.

The Statute 8 Geo. I. c. 4, s. 2, Ir., enacts, that in any action or suit in Law or Equity, for recovery of a debt due by bond, judgment, Statute, or recognizance due and payable twenty years before the action or suit brought, where no action or suit had been prosecuted for recovery thereof, nor any interest or money had been paid or other satisfaction made on account thereof, within twenty years before the commencement of such action or suit, the defendant might plead payment in bar, which plea was to be effectual, unless the plaintiff, or those under whom he claimed, had commenced or prosecuted some action or suit for the recovery of such debt, or should prove that some interest or money had been paid, or other satisfaction made on account thereof, within twenty years before such action or suit commenced. Stat. 8 Geo. I. c. 4, Ir.

This Statute, 8 Geo. I., was intended to apply where there was no payment on account, though there was a person entitled to demand such payment, and where no suit of any description was instituted to enforce payment, from which circumstances satisfaction of the judgment might be presumed; 2 Sch. & Lef. p. 20. Any proceeding by the creditor to enforce his demand took the case out of the Statute 8 Geo. I.

The twenty years are reckoned from the time of issuing the writ, not

from the *teste* of the writ relied on as a proceeding to take the case out of the Statute; *Regina v. Bayly*, 1 Dru. & War. 213. Filing a bill, or even a charge under a decree, though not prosecuted with effect, is still a proceeding sufficient to save the bar of the Statute, 8 Geo. I.; *Plumtree v. O'Dell*, 3 L. R. N. S. 133; *Smith v. Creagh*, Batty, 384; *Boyd v. Higginson*, 5 Ir. Eq. R. 97; and a proceeding against the principal debtor saved the bar of the Statute as against the surety; *O'Shee v. Warrens*, 1 Jebb & S. 504; but redocketing the judgment was not a sufficient proceeding to take the case out of the Statute 8 Geo. I., 1 Hayes & J. 372.

Recognizance must now be sued out within twenty years.

It has been held that a recognizance to the Crown is not within the operation of this Statute 8 Geo. I.; *Regina v. Bayly*, *sup.* (1 Dru. & War. 213). But the Statute 3 & 4 Vict. c. 105, s. 32, enacts, that all actions of debt, or *scire facias*, upon any recognizance, as well as actions of debt for rent on an indenture of demise, and all actions of covenant or debt upon a bond or other specialty, shall be commenced within twenty years after the cause of action.

Stat. 3 & 4 Will. IV. c. 27, distinguished from prior Acts.

The Statute 3 & 4 Will. IV. c. 27, extinguishes the right and title of the owner of land, and transfers not only the right, but the legal fee simple, to the party whose possession is a bar; the old Acts only barred the remedy; *Incorp. Society v. Richards*, 1 Dru. & War. 258; *Scott v. Nixon*, 3 Dru. & War. 388.

Section 40 of this Act enacts, that after the 31st December, 1833, no action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of any land or rent, at Law or in Equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit, or proceeding, shall be brought, but within twenty years after such payment or acknowledgment, or the last payment or acknowledgment was given.

Payment on account saved the bar of both Statutes,

A payment on account will save the debt from being barred by the operation of either of those Statutes; and payment by the principal debtor will take the case out of the Statutes as against the surety; *O'Shee v. Warrens*, *sup.* (1 Jebb & S. 504); *Kelly v. Kelly*, 6 Law R. N. S. 222; and see 2 H. & Br. 523.

if made by the debtor or his agent, to creditor or his agent. But acknowledgment did not save the bar of the Stat. 8 Geo. I.

The payment which will take the case out of the Statute, must be a payment of part of the principal, or interest, by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent.

But an acknowledgment in writing was held not to prevent the bar of the Statute, 8 Geo. I.; and, therefore, payment was well pleaded in bar of a *scire facias*, on a judgment twenty years old, notwithstanding a promise to pay the debt made within twenty years; *Maddock v. Bond*, Ir. T. R. 332;

for the Statute gave the debtor a right to plead payment, unless there had been, within twenty years, either a payment on account or a suit instituted.

On the other hand, a suit instituted, but not prosecuted with effect, is not sufficient to prevent the bar of the Statute, 3 & 4 Will. IV. c. 27, s. 40; and, therefore, no suit can be instituted to raise a charge upon land after twenty years, notwithstanding that a suit may have been instituted within twenty years previously, for the purpose of raising the same; *Irwin v. Ormsby*, 2 Jebb & S. 91-128 (see 1 Jebb & S. 501; also 1 Jebb & S. 503); the only exceptions provided for by the 40th section, are the cases of a payment on account, or an acknowledgment in writing, within twenty years.

Nor does a suit instituted save the bar of the 3 & 4 Will. IV. c. 27.

If the judgment creditor should proceed not against his debtor personally, but against his lands in the hands of his heir or terre-tenants, then the old Act, the 8 Geo. I., is repealed by 3 & 4 Will. IV. c. 27; *Farran v. Ottiwell*, 5 Ir. L. R. 487; and therefore, it is immaterial whether there were a suit instituted within the twenty years or not; *Incorporated Society v. Richards*, 1 Dru. & War. 258; see Longf. & T. 462. It was doubted whether the Statute, 8 Geo. I., was not still in force in a suit against the original debtor personally, and, therefore, as respects his liability, it was deemed immaterial whether evidence could or could not be adduced of an acknowledgment in writing within twenty years; *Brady v. Fitzgibbon*, 1 Jebb & S. 503; 2 Jebb & S. 91.

If therefore the object be to raise the debt out of land, the latter Statute repeals the former, and a proceeding taken is insufficient to keep alive the debt.

But in the case of *Henry v. Smith*, 2 Dru. & War. 390, Sir E. Sugden, C., lays it down, that if a debt be payable out of land, and the remedy under the real security is barred by the Statute, it is also barred in respect to the remedy against personal estate; and now the Statute 7 & 8 Vict. c. 90, has put an end to these doubts by enacting (sec. 39), that the Act 8 Geo. I. shall be deemed to have been repealed by the latter Statutes of Limitation.

It seems to have been at one time held that the effect of a part payment or acknowledgment was to revive the original debt by rebutting the presumption of payment arising from length of time. But it seems now settled that when a debt is once barred by the Statute, a new promise is necessary to take the case out of the Statute; the new promise furnishes a new cause of action, and the payment on account, or acknowledgment is received as evidence of such new promise; *Tanner v. Smart*, 6 B. & Cr. 603. On this principle it has been ruled, that a part payment after action brought will not take the case out of the Statute of Limitations, because it is not evidence of the cause of action in the declaration; *Bateman v. Pinder*, 2 Gale & Dav. 790.

The acknowledgment which will take the case out of the Statute 3 & 4 Will. IV. c. 27, must be an acknowledgment of the right to the debt, to the person entitled thereto, or his agent, and must be in writing, signed by the person by whom it is payable, or his agent, with the view of admitting liability; *Holland v. Clarke*, 1 Y. & Col. C. C. 151; and the debt ought to be subsisting at the time the acknowledgment was given, for an acknow-

To save bar of the Statute acknowledgment must be in writing, signed by the debtor or his agent,

to the creditor or his agent.

Admission by insolvent in schedule sufficient.

The Statute runs from accruer of right, *e. g.* in case of a remainder-man, from death of tenant for life ;

In case of a *post obit* from death of life ;

In case of judgment of revivor or decree, from the date thereof.

Judgment of revivor gives a new right.

Appointment of a Receiver does not necessarily save a debt.

Effect of the

ledgment after the late Act will not set up a debt previously barred by the Statute, 8 Geo. I. ; *Morrogh v. Power*, 5 Ir. L. R. 494.

The payment or acknowledgment would save the debt though made before the Act 3 & 4 Will. IV. c. 27 ; *Dugdale v. Vize*, 5 Ir. Law R. 568 ; and a payment or acknowledgment by a trustee to whom lands are devised in trust for payment of debts, or his agent, will be sufficient to keep the debt alive ; *St. John v. Boughton*, 9 Sim. 219 ; and a return of the debt as admitted, made by the debtor in his schedule, filed before he was discharged as an insolvent, is sufficient to save the debt from being barred ; *Barrett v. Birmingham, Fl. & K.* 556 ; S. C. 4 Ir. Eq. R. 537 ; *Morrogh v. Power, sup.* (5 Ir. Law R. 494) ; *Dugdale v. Vize, sup.* (5 Ir. Law R. 568).

The twenty years are reckoned from the time when the present right to receive the debt accrues to some person capable of giving a discharge for the same. Thus a remainder-man has twenty years after his remainder vested in possession, although he might previously have entered for the forfeiture occasioned by the alienation of tenant for life ; *Kemp v. Westbrook*, 1 Ves. Sen. 278 ; 1 Wms. Saund. 319 (1) *n.* ; *Thompson v. Simpson*, 1 Dru. & War. 459.

So in the case of a *post obit* bond, the Statute does not begin to run until the death of the life ; *Barber v. Shore*, 1 Jebb & S. 610.

And so we have seen in the case of a new adjudication in favour of the creditor, by judgment of revivor, or decree, the creditor acquires thereby a new present right, which may be enforced at any time within twenty years next after the date of such judgment or decree.

Where the judgment had been revived, the question has been much agitated, how far the judgment of revivor has the effect of keeping the original judgment alive by saving it from the operation of the 40th section of the Statute 3 & 4 Will. IV. c. 27 ; *Kelly v. Bodkin*, 5 L. R. N. S. 241 ; S. C. Sausse & Sc. p. 218 ; 1 Jebb & S. 503, 579 ; *Farran v. Ottiwell*, 2 Jebb & S. 97 ; 2 Ir. L. R. 110. It seems clear that the judgment of revivor is not within either of the exceptions of the Statute 3 & 4 Will. IV. c. 27, s. 40. It does not amount either to a payment on account, or an acknowledgment in writing ; and if the Statute were pleaded in bar of the original judgment, it would be a departure to reply the judgment of revivor ; for the judgment of revivor may be considered so far as an original judgment that it gives a new present right to receive the debt, and therefore a new period of twenty years to sue upon the judgment ; *Farran v. Ottiwell*, 2 Jebb & S. 97 ; 2 Ir. L. R. 110 ; 5 Ir. L. R. 487.

But for many purposes the judgment of revival is merely a continuation of the original judgment ; *Newman v. Fitzgerald*, 6 Ir. Eq. R. 260 ; *Stewart v. Cottingham*, Ib. 248. The appointment of a Receiver for the benefit of the debtor, as, for instance, where the debtor is a minor, will not necessarily save the debt from the operation of the Statute ; *Harrison v. Duignan*, 2 Dru. & War. 295 ; for the possession of the Receiver is the possession of the suitor ; *Wrixon v. Vize*, 3 Dru. & War. 104 ; S. C. 5 Ir. Eq. R. 173.

Nor it seems will a report of the Master finding the debt to be due, save

the bar of the Statute in a proceeding at law by the conusee against the conusor; *Hill v. Stawell*, 2 Jebb & S. 389; *sed quære* whether Equity would not in such a case consider that the report, like a judgment of revivor, conferred a new right to receive the debt; *Fl. & K.* 565-6; or at least restrain the debtor from setting up the legal bar; *Wrixon v. Vize*, 5 Ir. Eq. R. p. 183-4. But a decree of a Court of Equity establishing the demand, in analogy to the effect of a judgment of revivor at law, gives a new right which may be acted on at any time within twenty years from the date of it; see *Wrixon v. Vize*, *sup.* (5 Ir. Eq. R. 173.)

report of the debt.

Decree gives a new right.

The Statute 3 & 4 Will. IV. c. 27, is not retrospective, and does not apply to suits instituted prior to the 31st day of December, 1833; *Starkie v. English*, 5 Ir. Law R. 419; *Peyton v. M'Dermott*, 1 Dru. & Wal. 198; *Padden v. Bartlett*, 3 Ad. & El. 884; *Wrixon v. Vize*, 3 Dru. & War. 104; and for this purpose the filing of the bill is the point which ascertains the time when the suit was instituted, not the service of *subpœna*; *Boyd v. Higginson*, *sup.* (5 Ir. Eq. R. 97); *Coppin v. Gray*, 1 Y. & Col. C. C. 205. But if the plaintiff has been guilty of improper delay, or has otherwise disentitled himself to the aid of Equity, the Court may not give the plaintiff the benefit of the Act; see *Foster v. Thompson*, 6 Ir. Eq. R. 168; *Mills v. Mills*, *Ib.* 106; but where a defendant was brought before the Court for the first time by amendment, after the 31st day of December, 1833, Lord Cottenham, C., was of opinion, that such defendant did not lose the benefit of the Statute. He could not be bound by the suit until he was a party to it; previously it was *res inter alios acta*: *Plowden v. Thorpe*, 7 Cl. & F. 137.

This Statute does not affect bills filed before 31st Dec. 1833, against the debtor;

On the other hand, if the debtor is defendant in a creditor's suit, instituted prior to the 31st day of December, 1833, and a decree has been pronounced therein, a creditor who comes in under the decree is considered *quasi* a plaintiff, entitled therefore to the benefit of the suit from the beginning, on the ground that the pendency of this suit may have prevented him from commencing an original suit of his own; and in this way many demands have been recovered which would otherwise have been barred by the late Limitation Act; *Brown v. Lynch*, 4 Ir. Eq. R. 316.

Although the decree and charges thereunder be subsequent to that date.

But where the suit has no relation to the rights of the creditor, *e. g.*, in a suit for specific performance, if the decree direct an account of incumbrances on the estate sold, in such case the creditor will be entitled only to six years' interest from the time of filing his charge; *Henry v. Smith*, *sup.* (2 Dru. & War. 381); and even in a creditor's suit, if a creditor lapse his regular time for coming in under the decree to account, although in general the Court would let him in at any time while there is a fund to be distributed (see *post*), yet this liberty will not be given where the creditor is barred by the Statute from commencing a suit of his own; *O'Kelly v. Bodkin*, 2 Ir. Eq. R. 369; and see the cases, *Berrington v. Evans*, 1 Y. & Col. (Ex.) 434; *Sterndale v. Hankinson*, 1 Sim. 393.

But after final decree in such suit a creditor will not be let in, to enable him to evade the bar of the Statute.

It may be here noticed that in Chancery, the right of resorting to old suits is now much curtailed, for at the expiration of ten years after filing an original bill in Chancery, or of such further time as the Court on motion

will allow, the cause, if not heard, stands dismissed; Gen. Ord. 27th March, 1843, No. 81.

3 & 4 Will. IV.
c. 27, s. 42,

The Statute 3 & 4 Will. IV. c. 27, s. 42, enacts, that after the 31st day of December, 1833, no arrears of rent, or interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, shall be recovered, but within six years next after the same respectively shall have become due, or next after an acknowledgment in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.

Provided that where a prior incumbrancer shall have been in possession of the land, or in receipt of the profits thereof, within one year next before the action or suit of a subsequent incumbrancer, the latter may recover in such action or suit the arrears which shall have become due during the time that the prior incumbrancer was so in possession, although such time exceed six years. It would seem that possession of a Receiver at suit of a prior creditor is possession of the suitor; 3 Dru. & War. 123.

must be plead-
ed at first op-
portunity;

It was held in the case of *Walsh v. Walsh*, 1 Jones & C. 52, that the defendant could not restrict the plaintiff's demand to six years' interest, in taking the account under the decree, if this Statute were not pleaded by the answer. The facts of that case were peculiar; and see *Drought v. Jones*, 2 Ir. Eq. R. p. 306. It seems clear that the 40th section of the Statute of Limitations, if not relied on by the answer, cannot in the office be set up in bar of plaintiff's demand.

does not oust
jurisdiction to
limit account to
bill filed.

The 42nd section of the Act does not deprive the Court of the discretionary power, in case of considerable laches on the part of the plaintiff unaccounted for, to confine the account to the filing of the bill; *Dormer v. Fortescue*, 3 Atk. p. 130; *Barrington v. O'Brien*, Ball & B. 173; *Petteward v. Prescott*, 7 Ves. 541; or to disallow such further portion of the plaintiff's demand as may have been occasioned by his own delay; *Mills v. Mills sup.* (6 Ir. Eq. R. 106).

Judgments are
charges within
the 42nd sec.

The point is now settled that a judgment debt is a sum of money charged upon, or payable out of land, within the meaning of this section; and therefore no greater arrear of interest can be recovered than six years prior to bill filed; *O'Kelly v. Bodkin*, 2 Ir. Eq. R. 361; *Henry v. Smith, sup.* (2 Dru. & War. 381), overruling *Kealy v. Bodkin*, Sausse & Sc. p. 218; and it seems that though a personal action be brought against the debtor, still no more than six years' interest can be recovered thereon; *Henry v. Smith, sup.* (2 Dru. & War. p. 391); *Hughes v. Kelly*, 3 Dru. & War. 482; S. C. 5 Ir. Eq. R. 286; *sed vide Du Vigier v. Lee*, 2 Hare, 326.

By force of the 42nd section of this Act, no more than six years' interest can be recovered, although the land be vested in a trustee to pay the debt; *Burne v. Robinson*, 1 Dru. & Wal. 688; S. C. 1 Ir. Eq. R. 333; but in suits as to personal estate *vide Wedderburne v. Wedderburne*, 2 Keen, 722-749; S. C. 4 Myl. & Cr. 41.

The Statute 3 & 4 Vict. c. 105, s. 32, enacts, that actions of debt for rent on an indenture, or debt or covenant on a bond or other specialty, or debt or *scire facias* on a recognizance, shall be commenced within twenty years.

But this does not repeal the Statute 3 & 4 Will. IV. c. 27, s. 42. The Act of the Queen provides that the principal shall not be recovered after twenty years. The 3 & 4 Will. 4, c. 27, s. 42, provides that interest on that principal shall not be recovered for more than six years; *Hughes v. Kelly, sup.* 3 Dru. & War. 482; (5 Ir. Eq. R. 286).

We have seen that the Statute 3 & 4 Vict. c. 105, s. 32, provides, that actions on bonds must be commenced within twenty years from cause of action.

In the case of a bond debt, interest to the amount of twenty years may be recovered, for the Statute restricting the amount of arrears to six years, does not extend to bonds; so that in this respect the creditor may have injured his security instead of bettering it, by entering judgment on his bond; but whether judgment be entered or not, the penalty is the debt in Equity as well as at Law, and interest will not be carried beyond the penalty of the bond; *Latouche v. Fitzgerald*, 2 Ridg. P. C. 333; *Barry v. Wilkinson*, 3 Ir. Eq. R. 121; *Clarke v. Seton*, 6 Ves. 411; *Trapaud v. Cormick*, 1 Hog. 277; *Upton v. Upton*, 6 Ir. Eq. R. 471; except as against the debtor in certain special cases, *e. g.*:—Interest beyond the penalty will be given,

On bond debt more than six years' interest may be recovered, so that a bond may prove better than a judgment; but interest not carried beyond the penalty, save in special cases.

1. Where the creditor has been restrained by injunction from proceeding at law, without misconduct on his part; *Grant v. Grant*, 3 Russ. 598; *Pulteney v. Warren*, 6 Ves. 72; and see 1 Hov. Sup. 265.

2. Where the creditor had issued an *elegit*, and recovered possession thereupon, and has been made to account in Equity for his receipts; *Godfrey v. Watson*, 3 Atk. 517.

3. Where for any purpose the creditor has been made a defendant in Equity, the Court may make the bond debtor do equity by paying interest beyond the penalty.

4. Where the creditor was a trustee in possession of his debtor's lands, and has applied the rents to pay other debts; *Atkinson v. Atkinson, sup.* (1 Ball & B. 238).

5. Where the debt is secured not alone by the bond, but also by a mortgage; *Clarke v. Lord Abingdon*, 17 Ves. 106.

But these exceptions, perhaps, would not be allowed to the prejudice of other creditors; *Mackworth v. Thomas*, 5 Ves. 329; 1 Hov. Sup. 512. A conveyance upon trust to sell and pay bond debts, with interest, will not entitle the creditor to interest beyond the penalty; *Hughes v. Wynne*, 1 Myl. & K. 20.

This rule, limiting interest to the amount of the penalty, will, in some cases, place simple contract creditors in a better situation than bond creditors; *Lloyd v. Hatchett*, 2 Anstr. 525. When once the debt has reached the penalty, no further interest, it seems, shall be payable, notwithstanding a partial payment reducing the debt below the penalty; *Gregg v. Glover*, Fl. & K. 614.

So that a simple contract debt, bearing interest, may prove better than either a bond or judgment.

The Statute 9 Geo. II. c. 5, Ir., provides that where a conusee of a judgment, his executors, &c., assigns the same, he shall also perfect a memorial of such assignment under his hand and seal, containing the name and addition of the assignor, and the name of the assignee, and the sum mentioned in the assignment to remain due, and shall make an affidavit at foot of the memorial, of the perfection of the assignment, and such memorial and affi-

Assignment of judgments.

davit shall be lodged in the office where the judgment shall be entered and enrolled, and thereupon by Section 2 (amended by 25 Geo. II. c. 14, s. 1), such assignee, his executors, administrators, or assigns (and no other person), may, in his or their own name or names, revive such judgment, and proceed thereon, and also discharge and release same, and enter satisfaction on the record, as the conusee might do ; and such assignee shall be, to all intents and purposes, at Law and in Equity, in the place of the assignor, and payment to such assignee may be pleaded specially.

In Ireland the legal interest in a judgment passes by assignment on record.

By force of these Statutes the judgment is vested, at Law and in Equity, in the assignee, whereas in England, there being no similar Statute, the assignment of a judgment can only be an equitable assignment, and the assignee must sue in the name of the assignor, as in case of a bond, or any other *chose* in action.

But there must be a deed, and a memorial enrolled.

Judgments recovered in adverse suits are not assignable under these Statutes, which relate only to judgments confessed as securities ; *Gray v. Lane*, 4 L. R. N. S. 159. The property in the judgment will not pass without an actual assignment, *Lloyd & G. temp. P.* p. 100 ; and the assignee will not take the legal interest unless the memorial be enrolled under the Statutes. After the memorial of the assignment of the judgment has been enrolled, the deed of assignment is of little value, for the assignment is proved not by the deed of assignment, but by an attested copy of the memorial of the assignment ; *Hobhouse v. Hamilton*, 1 Sch. & Lef. 207 ; and see *Malcomson v. Gregory*, 1 H. & Br. 310 ; and the attested copy must be produced and proved, notwithstanding the executor of a deceased conusor has admitted the assignment ; *Wood v. Blake*, 2 Mol. 392. The assignee of a judgment, if there be no fiduciary relation between him and the debtor, may recover the full amount due upon the judgment, although he paid a less sum for it ; but, on the other hand, the assignee takes subject to all equities connected with and attaching on the judgment, to which his assignor was subject, and shall recover no more than the assignor could have recovered, unless before advancing his money, the assignee gave notice to the conusor, and was permitted by him to take the assignment on the faith of the sum named by the assignor being *bonâ fide* due ; *Hickson v. Aylward*, 3 Mol. pp. 11-12 ; *Bowen v. Swift*, 1 Hayes & J. 277 ; *Ferrall v. Boyle*, 1 Ir. Eq. R. 391 ; and see 5 Ir. Eq. R. 485. The enrolment of the assignment does not affect the conusor with notice. If possible, the conusor should be made to join in the assignment ; *Ferrall v. Boyle*, *supra*.

Evidence of assignment is attested copy of record.

Assignee may recover the sum due on the judgment, although he paid less.

But assignee takes subject to all equities ; and therefore should give notice to the debtor ;

Priority of judgments not affected by the Registry Act, unless where a subsequent deed, taking precedence by force of the Registry Act, carries up with it intervening judgments.

Judgment creditors have no priority by the Registry Act, 6 Anne, c. 2, s. 4 ; therefore an unregistered settlement will have priority to a subsequent judgment ; *Brown v. Blake*, 1 Mol. 620 ; unless when there is a conflict between two deeds, which renders it necessary, in adjusting their priority, to give effect to the enactment that every deed shall be effectual according to the priority of its registration : then, if there be intervening judgments, the deed which is subsequent in date, but prior by registration, will carry up the judgments, so as that in retaining their priority to the deed, last executed, the judgments acquire priority to the deed first executed ; *Crymble v. Adair*, Beatty, 122 ; *Latouche v. Dunsany*, 1 Sch. & Lef. 137.

But if the person claiming under the registered deed does not insist on his priority over the unregistered deed, the latter will take precedence of the judgments, for then there will be no conflict between the deeds; *Sparrow v. Cooper*, 1 Jones, 72; and therefore if the claimant under the prior unregistered deed can purchase up the claim under the subsequent registered deed, he may thereby prevent the intervening judgment creditors from obtaining priority by means of the registered deed; *Murtagh v. Tisdall*, Fl. & K. 20.

The Statute 3 & 4 Vict. c. 105, s. 23, enacts, that if the person against whom a judgment shall have been entered, shall have Government stock, funds, or annuities, or stock or shares of or in any public company in Ireland, standing in his name, in his own right, or in the name of any person in trust for him, the Court of Chancery, or the Court of Exchequer at the Equity side thereof, on petition of the judgment creditor, or any of the superior Law Courts, or a Judge thereof, on the application of the judgment creditor, may order such stock or shares, or any part thereof, to stand charged with the amount of the judgment debt and interest thereon, which order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of the charge until after six months from the date of the order.

The charging order will attach the interest of the judgment debtor in the stock or shares, whatever be the nature of such interest, be it vested, or contingent, in possession, remainder, or reversion; *Carter v. Mahon*, Flan. & K. 342; and the Accountant-General of the Court will be deemed a trustee for the judgment debtor within this Statute, if such debtor have an interest in stock standing in the name of that officer.

The charging order will be made in the first instance *ex parte*, without notice to the debtor, and though only an order to shew cause, yet it will restrain the transfer of the stock or shares until the order be discharged or made absolute. If unopposed, the Court has no jurisdiction to give the costs of the charging order; *White v. Heron*, 5 Ir. Law R. 165. If the application for an order to charge stock, &c., be made to a Court of Equity, a petition must be preferred; *Wallace v. M'Cann*, Flan. & K. 570; S. C. 4 Ir. Eq. R. 522. The Act does not entitle a judgment creditor to an order charging funds standing in the name of the real or personal representative of a deceased debtor; nor to an order charging the surplus produce of the deceased debtor's estate; *Wallace v. M'Cann*, *sup.*; nor to an order charging an unascertained share; *White v. Heron*, *sup.* (5 Ir. Law R. 167), nor to an order charging the purchase-money of the debtor's estate, of which the sale was not complete nor the money paid; *Robinson v. Peace*, 7 Dowl. P. C. 93. When the charging order is made absolute, the creditor may file his bill to procure payment of the debt by sale of the stock or shares charged.

The Stat. 3 & 4 Vict. c. 105, s. 26, enacts, that every debt due upon any judgment not confessed or recovered for a penal sum to secure principal and interest, shall carry interest at the rate of four pounds *per cent. per*

Judgment creditor may now attach his debtor's property in the Funds, and in shares of public companies,

by procuring an order. Which will be equivalent to a charge created by act of the debtor; to be enforced at any time after six months; so far as the interest of the debtor in the property extends.

Conditional order is given *ex parte*.

Petition necessary to procure an order of Court of Equity.

Order to charge property of deceased debtor not granted;

nor to charge funds not the property of the debtor.

Judgments in case, &c., now bear interest.

annum from the time of entering up the judgment, or from the 1st day of November, 1840, if the judgment were entered previously to that day; and such interest may be levied under a writ of execution.

This enactment does not apply to judgments upon bonds for penal sums conditioned to pay the debt with interest. Upon these securities the contract ascertains the rate of interest, and the creditor may levy the amount of his debt and interest, so that the entire amount levied do not exceed the penalty of the bond. But with regard to judgments in case, and in adverse suits, creditors were not, prior to this Act, entitled to recover interest in any proceeding by execution upon the judgment; *Sterling v. Wynne*, 1 Jones, 51; *Sausse & S.* 229; *Lloyd & G. temp. P.* 235, n. Nor would the judgment creditor be allowed interest under a decree directing an account of what was due to him; unless, perhaps, where the judgment was on a bill or note, &c., which carries interest at Law and in Equity; *Lowndes v. Collens*, 17 Ves. 27; although if he had brought an action on his judgment, the jury would have given him interest in the shape of damages.

Decrees and orders to pay money or costs, are now equivalent to judgments,

and may be proceeded on as judgments; but will not affect lands, &c. until registered.

Decrees and Orders of the Court of Chancery and of the Court of Exchequer at the Equity side thereof, and Rules of the superior Law Courts, and Orders of the Courts of Chancery and Exchequer, whereby any sum of money or any costs shall be payable to any person, shall have the effect of judgments, and the persons to whom such money or costs shall be payable shall be judgment creditors within the meaning of the Act; and the same remedies are given to such persons as are by the Act given to judgment creditors.

Provided that no Decree, Order, or Rule shall, by virtue of this Act, affect lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until the Decree or Order be registered in the manner prescribed, sec. 28; and now see the Stat. 7 & 8 Vict. c. 90, ss. 3, 4, providing that no Rule or Order shall affect lands, &c., as to purchasers, mortgagees, or creditors, unless registered under that Act; *ante*, p. 320.

A creditor entitled to money or costs under a Decree or Order, may now enforce payment thereof, not only by attachment but also by a writ of execution, or by a petition under "the Sheriffs' Act" (5 & 6 Will. IV. c. 55), stating in the petition the date of the Order, and the amount due on foot thereof; or by bill in Equity to raise the amount due by a sale, in the same way, and subject, of course, to the same restrictions, as a creditor by judgment would be subject to; and as by the 27th section of "Pigot's Act" judgment debts carry interest, so money or costs ordered to be paid shall carry interest.

Orders to pay money or costs out of a fund will not bear interest.

Frame of judgment creditor's bill.

But it appears that these sections do not apply to Orders to pay money or costs out of the produce of the sale of an estate, but only to Orders directing one person to pay money or costs to another; *Attorney-General v. Nethercote*, 11 Sim. 529; 1 Hare, 316, n.; *Lynch v. Skerrett*, 5 Ir. Eq. R. 494.

With respect to the frame of a bill by a judgment creditor, if the conusor be dead, the bill should be in the usual form of a bill by a creditor to administer the personal and real assets of his deceased debtor. (*See post.*)

But if the conusor be living, the bill may, in the first place, state the

loan and the entry of the judgment ; it may then proceed to state that the conusor was, at the time of entering up the judgment, or at some time afterwards became seised or possessed of or entitled unto ALL THAT AND THOSE [*stating and describing the property of the debtor, as far as it is known*], and that he was, at the period aforesaid, seised, &c. of other lands, for some estate or interest, the particulars whereof are unknown to plaintiff, and that the conusor has executed several conveyances and assignments of his property, but refuses to disclose the particulars thereof, or to what persons, or for what, if any, consideration, the same were made ; the bill should state that the conusor, or his grantees or assignees, are in possession of the property, and should state in what right each party to the suit is brought before the Court, and should shew the sum due to the plaintiff on foot of his demand, with the usual applications and refusals to pay, and after inserting, if necessary, pretences and charges for the purpose of answering any anticipated objection to the relief sought, the bill should interrogate to all the material statements and charges, in the form prescribed by the late Chancery Orders, and should pray an account of the sum due to the plaintiff for principal, interest, and costs, on foot of the judgment, and an account of the lands and hereditaments of or to which the conusor was seised, possessed, or entitled at the date of the rendition of the judgment, or at any time afterwards, and that the sum due to plaintiff for principal and interest may be deemed to be well charged on the said lands and hereditaments, and that the same, together with plaintiff's costs, may be paid within a fixed time, or in default a sale, and for that purpose an account of all incumbrances affecting the said lands and hereditaments, and the priority thereof, the sums due thereon, and the persons entitled thereto, and in the mean time a Receiver, with the usual consequential relief.

BILL BY JUDGMENT CREDITOR.

Bill by Judgment Creditor for Sale of real Estate of Conusor in his Life-time.

To the, &c.

In Chancery.

Application for
loan.

HUMBLY complaining, sheweth unto your Lordship, your suppliant William Thompson, of, &c., that in the year 1825, John Jones, of, &c., Esq., one of the defendants hereinafter named, having occasion to borrow a sum of £1000, applied to and requested your suppliant to lend him the said sum on the security hereinafter mentioned, and your suppliant agreed so to do, and did accordingly lend and advance the said sum of £1,000 to the said John Jones.

Loan.

Bond and warrant.

And thereupon, and in order to secure the repayment thereof, with lawful interest, the said John Jones duly executed his bond, or obligation in writing, bearing date on or about the 1st day of May, in the year 1825, with warrant of attorney for confessing judgment thereon in the penal sum of £2,000 sterling, with a condition to the said bond annexed, making void the same upon payment of the said sum of £1,000 sterling, together with interest at the rate of *£5 per cent. per annum*, on the 1st day of November, 1825; upon which bond, by virtue of the said warrant, your suppliant did, in or as of Michaelmas term, in the said year 1825, obtain judgment in Her Majesty's Court of Queen's Bench, in Ireland, against the said John Jones, for the said sum of £2,000 sterling, together with the costs of entering the said judgment, as by the records of said Court may appear.

Judgment.

Your(a) suppliant further sheweth unto your Lordship, that in or as of Hilary term, in the year of our Lord, 1843, your suppliant having issued a writ of *scire facias*, for the purpose of reviving the said judgment, the same was duly revived.

Revivor of judgment.

Your suppliant further sheweth, that your suppliant caused the said judgment to be duly registered, pursuant to the provisions of the Statute in that case made and provided.

Registry of judgment.

Your suppliant further sheweth, that at the time of the rendition of the said judgment the said John Jones, the conusor thereof, was seised, or possessed of, or otherwise well and sufficiently entitled unto, or had some sufficient disposing power over the several lands, tenements (rectories, advowsons, tithes, rents) and hereditaments hereinafter mentioned, that is to say, ALL THAT AND THOSE, &c.

Conusor's property bound by the judgment.

And your suppliant further sheweth, that in some time after the time of entering up the said judgment, the said John Jones acquired and became seised and possessed of, or well entitled unto several other lands, tenements, and hereditaments, that is to say, ALL THAT AND THOSE, &c.

Your suppliant further sheweth, that by deed bearing date on or about the 1st day of May, 1842, and made between, &c., the said John Jones did, for the considerations therein mentioned, convey and assure to John Scott, a defendant hereinafter named, ALL THAT AND THOSE the said lands of *Grange*, situate, &c., as by the said deed, in the possession of some of the defendants hereinafter named, and by the memorial of the registration thereof, will appear.

Part of which has been sold;

Your suppliant further sheweth, that by indenture of mortgage, bearing date on or about the 1st day of January, 1840, and made between, &c. ; he the said John Jones did convey and assure ALL THAT AND THOSE the said lands of, &c. unto James Roe, his heirs and assigns, subject to redemption on payment of the sum of £500, sterling, with interest after the rate and in the manner therein mentioned; as by the said indenture in the possession of some or one of the defendants, will appear; and the said James Roe, under and by

part mortgaged.

(a) Although this statement may be properly inserted when the judgment has been revived, yet unless the revival be material with reference to the Statute of Limitations, &c., it does not form an essential part of the plaintiff's case when he seeks to raise the amount of his judgment by a bill; but if he were proceeding by petition under the "Sheriffs' Act," or "Pigot's Act," the case would be otherwise.

virtue of the said indenture of mortgage, claims some interest in the lands and premises hereinbefore mentioned.

Part charged
with an annuity,

Your suppliant further sheweth, that by indenture bearing date on or about the 13th day of May, 1841, the said John Jones, for the considerations therein mentioned, granted to one John Doe, a defendant hereinafter named, an annuity or yearly sum of £100 *per annum*, for the life of him the said John Doe, and in order to secure the payment of the said annuity to the said John Doe, he, the said John Jones granted and demised ALL THAT AND THOSE the said lands of, &c. to Richard Roe, his executors, &c., for the term of 100 years therein mentioned; as by the said indenture, in the possession of the defendants, or of some or one of them, will appear; and the said John Doe and Richard Roe claim some interest in the said lands, under and by virtue of the said deed.

or otherwise
incumbered.

[*State the title of any other specific incumbrancers, so far as plaintiff is aware thereof.*]

Judgments con-
fessed.

Your suppliant further sheweth that the several persons following, that is to say, John Price, James Price, and Paul Price, claim some interest in or charge upon the said lands and premises, by virtue of certain judgments obtained by them respectively against the said John Jones, the particulars whereof the said John Jones refuses to discover to your suppliant.

Conusor is in
possession ;
save as to the
lands he has
sold.

Your suppliant further sheweth, that the said John Jones is in actual possession or receipt of the rents of the said several lands and premises, save and except the lands of *Grange*, which are now in the possession of the said John Scott.

Interest paid
to plaintiff.

Your suppliant further sheweth, that interest was paid by the said John Jones to your suppliant, on foot of your suppliant's said judgment debt, up to the 1st day of May, 1840, since which time no further interest has been paid to your suppliant, and there is now due and owing to your suppliant on foot of his said judgment, the said principal sum of £1,000, together with an arrear of three years' interest up to the 1st day of May, 1843, besides costs.

Amount due to
plaintiff.

Applications
for payment.

And your suppliant hath frequently in a friendly way applied to the said John Jones, and requested him to pay your suppliant's said demand; and your suppliant on or about the 1st day of May, 1843, served a formal notice on the said John Jones, requiring him forthwith to pay to your suppliant the sum due for principal and interest on foot of the said judgment, or in default thereof, that your sup-

Written notice
served.

pliant would file a bill against the said John Jones, for the purpose of raising the amount thereof by a sale of the said John Jones's estate; and your suppliant hoped that such requests would have been complied with, as in justice and equity they ought to have been.

But now so it is, &c., *ante*, p. 17.

Combination.

And the said defendant, John Jones, sometimes pretends that he never received the said sum of £1,000 from your suppliant, the contrary whereof your suppliant charges to be the fact, and so the said defendant will at other times admit, but then again he pretends and alleges that there are various charges and incumbrances affecting the said lands and premises, but refuses to discover the particulars thereof to your suppliant, or in whom the same are vested. All which, &c., *ante*, p. 18.

Charging part.

General averment.

To the end, therefore, that the said defendants may, if they can, shew why your suppliant should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say :

Interrogating part.

1. Whether your suppliant did not lend to the said John Jones, at the time hereinbefore in that behalf mentioned, or at some other time, and when, the said sum of £1,000, or some other and what sum of money ?

2. Whether the said John Jones did not execute his bond and warrant, of such date, purport, and effect, as hereinbefore in that behalf stated, or how otherwise ?

3. Whether your suppliant did not enter judgment on the said bond as of the term, and in the Court hereinbefore in that behalf mentioned, or how otherwise ?

4. Whether the said judgment was not duly revived by your suppliant as hereinbefore mentioned, or how otherwise ?

5. Whether said judgment was not duly registered, pursuant to the provisions of the Statute in that case made and provided, or how otherwise ?

6. Whether interest on the said judgment debt was not paid by the said John Jones to your suppliant, up to the 1st day of May, 1840,

and whether the full principal sum of £1,000, together with some and what arrear of interest is not now due to your suppliant ?

7. Whether the said John Jones, at the time of entering up of the said judgment, or at some time afterwards, and when particularly, was not seised, possessed of, or entitled unto the several lands, tenements (rectories, advowsons, tithes, rents), and hereditaments hereinbefore mentioned, or some and which of them, or some and what parts thereof respectively, and of some and what other lands, tenements, rectories, advowsons, tithes, rents, or hereditaments, for some and what estate, or interest, and whether at Law or in Equity, and whether in possession, reversion, remainder, or expectancy, or otherwise, and how ?

8. Whether the said John Jones, at the time of entering up of the said judgment, or at any time afterwards, and when, had any and what disposing power which he might, without the assent of any other person, exercise for his own benefit, over any and what hereditaments and premises ?

9. Whether the indenture of conveyance, bearing date the 1st day of May, 1842, hereinbefore mentioned, was not executed, or some other indenture to the like purport and effect, and what are the lands affected thereby, and what was the consideration *bonâ fide* paid or given for the same ?

10. Whether the indenture of mortgage bearing date the 1st day of January, 1840, &c. [*proceed as in the ninth interrogatory*] ?

11. Whether the deed of annuity, bearing date the 13th day of May, 1841 [*as in the ninth interrogatory*] ?

12. Whether the defendant John Jones, or any and what other person or persons deriving from him by conveyance or assignment, is or are in possession or occupation, or in receipt of the rents and profits of the said lands and hereditaments hereinbefore mentioned, or of any and what other lands, tenements, rectories, advowsons, tithes, rents, and hereditaments ?

Interrogatory
as to incum-
brances vested
in defendants ;

13. What right, title, or interest do the defendants respectively claim in or to the several lands, hereditaments, and premises hereinbefore mentioned, or any other lands and hereditaments of which the said John Jones, at the time of the rendition of the said judgment, or at any time afterwards, was seised or possessed, or entitled unto, or over which he, the said John Jones, had any disposing

power, or any and what part thereof, and how do they respectively make out and derive the same, and by what deeds, writings, or grants, and what are the dates, and short and material contents of such writings and grants respectively ?

14. And what are the conveyances, mortgages, judgments, and specific incumbrances, if any, which affect such lands and hereditaments respectively, or any part or parts thereof, and whether are the same prior or subsequent to your suppliant's said demand, and what are the dates, parties' names, and places of abode, and other the short and material contents of such conveyances, mortgages, and deeds creating such specific incumbrances respectively, and when were the same made, and for what consideration, and in whom are the same now vested, and what are the sums now due on foot thereof respectively ?

or in third persons.

15. Whether there are other and what person or persons besides those hereinbefore mentioned, who have any and what interests in, or charges or incumbrances affecting the said lands and hereditaments, which would render them necessary parties to this suit ?

As to parties not before the Court.

16. In whose custody, possession, or power are now the several deeds hereinbefore mentioned, and all other the title-deeds and documents, tenants' leases, and muniments of title relating to the said lands and hereditaments, or any parts thereof; and in whose hands are all such deeds as in case of a sale of the said lands and hereditaments, would be necessary to enable your suppliants to make title to a purchaser, and when, where, and in whose possession did the said defendants respectively last see the same, or any and which of them, and what has become thereof respectively ?

As to title-deeds and leases.

17. What is the annual rental of the said several lands and hereditaments, and what is the quantity of ground in each particular tenement thereof, by whom held, for what term or interest, at what yearly rent, on what days is the same made payable, and what arrear, if any, is due thereon, and what are the dates, parties' names, and short contents of the respective leases, articles, or agreements by which the same are held, and what part thereof is now in the occupation of the said defendants ? And that the said defendants may view in the hands of your suppliant's solicitor or commissioner, all such exhibits as shall be produced to them and endorse their names thereon, and set forth what the same respectively are, and by whom signed or executed ?

As to rental.

Prayer.

Account of sum
due to plaintiff
and of the
lands, &c. of
conusor ;

and that plain-
tiff's demand
may be decreed
a charge there-
on

Decree for pay-
ment ;

or a sale ;

account of in-
cumbances ;

Payment.

Offer to redeem.

Receiver ;

and general re-
lief.

And that an account may be taken by and under the direc-
tion and Decree of this Honourable Court, of what is due to your
suppliant for principal, interest, and costs, on foot of the judg-
ment so as aforesaid obtained by your suppliant against the said
John Jones, after all just credits and allowances ; and also an account
of the lands and hereditaments of which the said John Jones was
seised at the time of entering up said judgment, or at any time since,
or of which he is possessed, or to which he is entitled, or over which
he has a sole disposing power ; and that the sum which shall be
found due and owing to your suppliant upon foot of your sup-
pliant's said judgment, may be declared to be well charged upon
such lands and hereditaments ; and that the said defendants, or such
of them as ought so to do, may be decreed to pay to your suppliant
what shall be found so due to him for principal, interest, and costs,
together with the costs of this suit, by a short day to be named for
that purpose ; or in default thereof, that the said lands and heredi-
taments, or a competent part thereof, may be sold ; and for that
purpose that all proper directions may be given, and all necessary
accounts taken ; and in particular an account of all charges and in-
cumbances affecting the said lands and hereditaments, and the na-
ture, priority, and amount thereof, and what is due thereon res-
pectively ; and that out of the produce of such sale your suppliant
and all other persons entitled, may be paid their several demands,
your suppliant being willing and hereby offering to redeem such of
the incumbances affecting the said estates as your Lordship shall
deem him bound to redeem ; and that all proper parties may be
directed to join in such sale, and to execute proper deeds of convey-
ance to the purchaser or purchasers thereof ; and that in the mean-
time a Receiver may be appointed to receive the rents and profits
of the said lands and hereditaments, and apply the same as your
Lordship shall direct ; and that your suppliant may have such further
and other relief as the nature and circumstances of the case may
require. May it please, &c.

[*Pray subpoena to appear and answer against*

John Jones [*the conusor*] ;

John Scott [*a subsequent purchaser*] ;

John Roe [*a subsequent mortgagee having the legal estate*] ;

John Doe [*a subsequent annuitant*] ;

and pray that the judgment creditors and any parties to the suit against whom no direct relief is sought, upon being served with notice may be bound, &c. thus:—]

May it please your Lordship to grant unto your suppliant Her Majesty's most gracious writs of *Subpœna*, to be directed to the said John Jones, John Scott, John Roe, John Doe, and their confederates, when discovered, thereby commanding them and every of them, at a certain day, and upon pain of process against them respectively for their neglect, to cause an appearance to be entered for them respectively in this Honourable Court to this your suppliant's bill of complaint, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further Order, Direction, and Decree therein, as to your Lordship shall seem meet; and may it further please your Lordship that the said John Price, James Price, and Paul Price, upon being served with the notice mentioned in the 15th General Order of this Honourable Court, may be bound by the proceedings in this cause. And your suppliant shall ever pray, &c.

Prayer of sub-
pœna to appear
and answer.

That "special
defendants"
may be bound.

BILLS FOR ADMINISTRATION OF ASSETS.

PRELIMINARY DISSERTATION.

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<i>Enactments rendering Powers of a Debtor available for Payment of Creditors.</i>	<i>Constructive Conversion.</i>
<i>Statute making real Estate Assets.</i>	<i>Right of Executor to Residue.</i>
<i>Estates Pur autre vie, Assets.</i>	<i>In Case of Intestacy real Estate how disposed of.</i>
<i>Order in which Demands on Assets paid.</i>	<i>Statute to amend Law of Inheritance.</i>
<i>Order in which Assets are applied in Payment of Demands.</i>	<i>Heir at Law how ascertained.</i>
<i>Marshalling of Assets.</i>	<i>Table of Descents.</i>
<i>Following Assets.</i>	<i>In Case of Intestacy personal Estate how disposed of.</i>
<i>Abatement on Deficiency of Assets.</i>	<i>Statute of Distributions.</i>
<i>After Decree in Administration Suit Creditors restrained from suing.</i>	<i>Table of Next of Kin under Statute of Distributions.</i>
<i>Effect of such Decree on Plaintiff's Demand.</i>	<i>Executor's Account.</i>
<i>Legacies—Substitutional—Cumulative; Vested—Contingent.</i>	<i>When taken with Rests.</i>
<i>Bill for Legacy.</i>	<i>Executor when charged with wilful Default.</i>
<i>Legacy to a Feme covert.</i>	<i>Executor not allowed for Time or Trouble.</i>
<i>Legacy to an Infant.</i>	<i>Graft.</i>
<i>Bequests of Annuities.</i>	<i>Who may institute a Creditor's Suit.</i>
<i>Legacies how affected by Statute of Limitations.</i>	<i>Costs in Administration Suits.</i>
<i>Trust for Payment of Debts and Legacies.</i>	<i>Contribution to Costs in Creditor's Suit.</i>
<i>Statute making real Estate Assets for Payment of simple Contract Debts does not charge the Debts.</i>	<i>Bill by Devisee against Heir in Case of Suppression of Will.</i>

Ground of equitable jurisdiction. THE whole jurisdiction of Courts of Equity in the administration of assets, is founded on the principle that it is the duty of the Court to enforce exe-

cution of trusts, and that the executor or administrator who has the property in his hands, is bound to apply that property in the payment of debts and legacies, and to apply the surplus according to the will, or in case of intestacy according to the Statute of Distributions; *Adair v. Shaw*, 1 Sch. & Lef. 262.

Personal assets are divided into personal and real, according as they go to the executor or to the heir of the testator or intestate.

Again, assets are divided into legal and equitable.

Legal assets consist of property which a Court of Law holds to be assets, and these must be distributed among creditors according to their priority. A lease for years is legal assets; so is a debt owing by an executor to his testator; so is property in the Funds; *Franklin v. Bank of England*, 9 B. & Cr. p. 161; so are goods, although beyond sea; so are sperate debts returned by the executor in his inventory to the Ecclesiastical Court, unless afterwards proved desperate.

Equitable assets consist of property which a Court of Equity only holds to be such, and which, when realized, are not legal assets in the hands of the executor; and these are applied to pay all creditors, *pari passu*, without regard to their priority.

Lands devised to the executor for payment of debts are equitable assets. So the produce of a charge on real estate for payment of debts, whether the descent be broken or not; *Bailey v. Ekins*, 7 Ves. 319; so the equity of redemption of mortgaged estates; so money due on a mortgage not returned by the executor in the inventory.

By the Statute of Frauds 7 Will. III. c. 12, s. 7, Ir., corresponding to the Statute 29 Car. II. c. 3, s. 10, Eng., trust estates in fee simple are made legal assets.

The Statute 3 & 4 Vict. c. 105, s. 19, makes trusts of a chattel interest legal assets for judgment creditors.

Where a man has a general power of appointment over a fund, that is, a power to appoint to whomsoever he pleases, *if he exercises such power*, whether by deed or will, the fund appointed shall form part of his assets, and his creditors shall take in preference to the appointees; *Troughton v. Troughton*, 3 Atk. 656; *Jenney v. Andrews*, 6 Mad. 264.

But it is necessary to remember that a power is different from a property; the power (unless it be in nature of a trust, as in the case of *Harding v. Glyn*, 1 Atk. 469) must be executed, or the creditors of the donee have no title, and, although in favour of creditors Equity will aid a defective execution, yet it cannot supply a non-execution of the power; *Holmes v. Coghill*, 7 Ves. 499. Nor could the Court by its decree have compelled the donee in his life-time to execute the power; *Thorpe v. Goodall*, 17 Ves. 460; and the deficiency of the assets of the donee will not warrant the Court to infer an intention to exercise his power over the fund; *Jones v. Curry*, Lev. 66.

To induce the interference of Equity in aid of the donee's creditors, there must be evidence of an intention to execute the power by a reference to the power, or to the subject of it, or else the devise or bequest must

tion in administering assets.

Assets personal and real, legal and equitable.

Legal assets.

Equitable assets.

Fund appointed under a general power, assets.

Distinction between a power and a property.

prove inoperative otherwise than as an execution of the power; see 1 Hov. Sup. 79, and cases there. The Legislature, however, has interfered to a certain extent in aid of creditors.

Enactments rendering debtor's powers available for payment of his debts.

The Bankrupt Act, 6 Will. IV. c. 14, s. 91, Ir., enacts, that all powers vested in a bankrupt, which he might legally execute for his own benefit, may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same.

The Statute 3 & 4 Vict. c. 105, s. 22, provides (as we have seen), that judgments shall operate as a charge upon all lands and hereditaments over which the consor shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit.

And finally, the late Statute of Wills, 7 Will. IV. & 1 Vict. c. 26, s. 27, in reference to wills made on or after the 1st day of January, 1838, enacts, that a general devise of the real estate of the testator shall be construed to include all real estate which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear from the will; and, in like manner, a general bequest of the personal estate of a testator, shall be construed to include any personal property, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

"Romilly's Act" to facilitate payment of debts out of real estate.

The Statute 1 Will. IV. c. 47, consolidating and amending the laws for facilitating the payment of debts out of real estate, enables creditors to recover upon bonds and other specialties against devisees, as well as against heirs, ss. 3, 4.

Section 5. Save as against devisees in trust to pay debts, &c.

Section 9. Traders' estates shall be equitable assets to pay as well simple contract debts, as those due on specialty. But creditors by specialty in which heirs are bound, shall be paid before creditors by simple contract.

Statute to render freeholds assets for simple contract debts.

Statute 3 & 4 Will. IV. c. 104, makes freehold estates of persons dying after 29th August, 1833, equitable assets for the payment of simple contract debts. But creditors by specialty in which the heirs are bound shall be paid before creditors by simple contract.

Before this Act freehold estates were not assets for simple contract debts; *Aldrich v. Cooper*, 8 Ves. 382.

Estates held *pur auter vie* were not included in the Statute of Wills, which extended only to estates in fee simple.

Statute of Frauds as to estates *pur auter vie*.

But by the Statute of Frauds, 7 Will. III. c. 12, s. 9, Ir., corresponding to the English Act, 29 Car. II. c. 3, s. 12, estates *pur auter vie* are made devisable like fee simple estates.

And if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if they shall come to him by reason of a special occupancy, as assets by descent; and in case there shall be no special occupant, they shall go to the executors or administrators of the grantee, and be assets in their hands.

Hence, the estate *pur auter vie* is real assets, if it be devised by the

grantee; so also if the grant be to the grantee and his heirs, in which case the heir takes as special occupant.

But if there be no devise and no special occupant, then the estate *pur auter vie* is personal assets, and this would seem to be so, although the grantee died since the 29th August, 1833. (See Statute 3 & 4 Will. IV. c. 104.)

The Statute 1 Vict. c. 26, repeals the Statute of Wills and the Statute of Frauds, so far as relates to devises and estates *pur auter vie*, excepting the cases not affected by this Act, but afterwards re-enacts in substance the provisions of the Statute of Frauds in respect to such estates.

Statute amend-
ing the law of
wills, so far as
relates to es-
tates *pur auter
vie*.

Section 3 empowers persons to devise and bequeath their real and personal estate, including estates *pur auter vie*, whether there shall or shall not be a special occupant thereof.

Section 6. If no disposition by will of an estate *pur auter vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as land in fee simple would be; and in case there shall be no special occupant, the estate shall go to the executor or administrator of the grantee, and be personal assets in his hands.

Section 34. This Act extends not to wills made before 1838, nor to estates *pur auter vie* of persons who die before 1838. As to the nature and quality of estates *pur auter vie*, see *Allen v. Allen*, 2 Dru. & War. 307.

Demands upon legal assets are to be paid thereout in the following order of priority, viz.:

Order of pri-
ority of de-
mands upon le-
gal assets.

1. Funeral and testamentary expenses.

2. Debts due to the Crown by record, or specialty.

3. Judgments and decrees. These have no priority among themselves as regards personal assets, but as against legal assets real each judgment has priority according to the date of its rendition; see *Avarell v. Wade*, 3 Ir. Eq. R. 446; and *Kirby v. O'Shee*, 4 Ir. Eq. R. 307.

4. Recognizances enrolled.

5. Debts due by specialty, including rent on a parol demise; *Thompson v. Thompson*, 9 Price, p. 471.

6. Debts on simple contract.

7. Voluntary bonds.

8. Legacies.

The executor is bound to take notice of the priority of debts of record, but may, in a reasonable time after testator's death, pay a simple contract debt before a debt due upon a specialty of which he had no notice.

Among creditors of equal degree, an executor or administrator may pay one in preference to another, and may retain his own debt due to him from the deceased, in preference to all other creditors of equal degree; *Lyttleton v. Cross*, 3 B. & Cr. 322; *Tipping v. Power*, 1 Hare, 405.

Right of execu-
tor to give a
preference, and
to retain.

Debts are to be paid in priority to legacies, even out of equitable assets, on the principle that the testator was bound to be just before he could be generous; *Kidney v. Cousmaker*, 12 Ves. 136.

Debts always
payable before
legacies.

The legatees are objects of the testator's mere bounty, whereas debts

carry with them by law the right to be paid out of the personal estate, a right which the testator could not take from them, for no man can exempt his personal estate from liability to his debts; 3 Sug. Vend. 152 (10th ed.) The right, therefore, of the creditor to be paid out of the personal estate of his debtor, not only does not, like a legacy, originate in the will, but cannot be defeated by it.

Order of liability of assets. The application of assets in payment of debts and legacies is in the following order, viz.:

1. Personal estate. Personal estate not specifically bequeathed, or exempted by express words, or by necessary implication; *Bootle v. Blundell*, 19 Ves. 494; 1 Hov. Sup. 223; *Lamphier v. Despard*, 2 Dru. & War. 59; S. C. 4 Ir. Eq. R. 334; *Ca. temp.* Talbot, 53, n. (h). See also *Wilton v. Ferguson*, 6 Ir. Eq. R. 33. This portion of the property of the deceased is legal assets, and shall be applied in payment of debts according to their respective priority, and then in payment of legacies. Hence the rents of real estate are not to be resorted to until it appears the personal estate is deficient; *Schomberg v. Humfrey*, 1 Dru. & War. 411.

2. Real estate devised for payment of debts. Real estate devised for payment of debts and legacies; *Davies v. Topp*, 1 Bro. C. C. 524. This is equitable assets, and shall therefore be applied in payment of debts *pari passu*; *Haslewood v. Pope*, 3 P. Wms. 323; *Deg v. Deg*, 2 P. Wms. 412; *Howse v. Chapman*, 4 Ves. 542; *Ll. & G. temp. Sug.* at p. 295, n. (b).

3. Real estate descended. Real estate descended. This is legal assets as to creditors by specialty in which the heirs are bound, and in those cases where the debtor has died since 29th August, 1833 (3 & 4 Will. IV. c. 104), equitable assets as to simple contract debts. By marshalling of assets (as to which see *post*), legatees, pecuniary or specific, may resort to this fund, but not otherwise; *Tipping v. Tipping*, 1 P. Wms. 729; unless the real estate be charged with payment of legacies.

4. Real estate devised subject to a general charge of debts. Real estate devised charged with the payment of debts; *Harmood v. Oglander*, 8 Ves. p. 125; *Barnewell v. Lord Cawdor*, 3 Mad. p. 456. This is equitable assets, to be applied therefore in payment of debts *pari passu*.

Though legacies be not charged, yet by marshalling of assets this fund may be made available for them.

5. Real and personal estate specifically devised or bequeathed. Real estate devised absolutely, and personal estate specifically bequeathed; *Long v. Short*, 1 P. W. 403; *Irvin v. Ironmonger*, 2 Russ. & M. 531; *Young v. Hassard*, Ir. Chanc. 1844, overruling *Cornewall v. Cornewall*, 12 Sim. 298. The personal estate specifically bequeathed is legal assets for payment of debts; *Lamphier v. Despard*, *sup.* (2 Dru. & War. 59; S. C. 4 Ir. Eq. R. 334).

Real estate devised is legal assets as to creditors by specialty in which the heir is bound; and in those cases where the debtor has died since 29th August, 1833, by operation of the Statute 3 & 4 Will. IV. c. 104, this fund is equitable assets for payment of simple contract debts. See *Ram on Assets*, 457, (2nd ed.)

Marshalling of assets. The general principle upon which Courts of Equity act, is to make, as nearly as possible, an equal distribution of assets to all the creditors of the deceased; hence the Court will direct that such of the creditors as received

any satisfaction out of the legal assets, shall receive nothing out of the equitable assets until all the other creditors shall be paid up equally with them; *Avarell v. Wade*, 3 Ir. Eq. R. 446; *Bradford v. Foley*, 3 Bro. C. C. 352, n.

Marshalling of assets is founded on this equitable rule, that where one claimant has power to resort to two funds he shall not, by the exercise of his option, disappoint a claimant who has only one fund to resort to. For example, where one claimant can resort either to the real or personal assets of his debtor, and another can resort to the personal assets only, the former shall take satisfaction out of the real assets, or if he exhaust the personal assets, or any part thereof, then the latter shall stand as against the real assets, *pro tanto*, in the place of the former; *Lanoy v. D. of Athol*, 2 Atk. 444; *Aldrich v. Cooper*, 8 Ves. 382; see 2 Hov. Sup. 118; *Avarell v. Wade*, *sup.* (3 Ir. Eq. R. 446); *Gwynne v. Edwards*, 2 Russ. 289, n.; *In re Cornwall*, 3 Dru. & War. 173; S. C. 6 Ir. Eq. R. 63. In the application of this doctrine the Court will take care not to subject any fund to a claim to which it was not before subject, nor to prevent the claimant with more than one fund from being paid in full. The principle is, that the election of the one claimant shall not be exercised so as to prejudice the claim of the other; see *Clifton v. Burt*, 1 P. Wms. 678, n. (1); *Tipping v. Tipping*, *sup.* (1 P. Wms. 729).

This Equity is not confined to creditors, it is extended to legatees also; *Clifton v. Burt*, *sup.* Thus, where the personal estate has been exhausted in payment of the creditors of the testator, legatees will be entitled to stand in their place against the real estate descended to the heir, if the creditors might, under the late Act or otherwise, have resorted to it; *Tipping v. Tipping*, *sup.* (1 P. Wms. 729); so also as against real estate devised to pay debts; *Haslewood v. Pope*, *sup.* (3 P. Wms. 323); or as against real estate charged with debts; *Webster v. Alsop*, 3 Bro. C. C. 352, n.; but not as against real estate devised absolutely; *Mirehouse v. Scaife*, 2 Myl. & Cr. 695; for the equity of the devisee is as good as that of the legatee; both derive their title from the bounty of the testator; *Clifton v. Burt*, *sup.* (1 P. Wms. 679); and this is so although the devisee be also the heir of the testator, in which case indeed he now takes, not by descent but as devisee; 3 & 4 Will. IV. c. 106, s. 3; *Strickland v. Strickland*, 10 Sim. 374; and the Court will not marshal assets to the prejudice of purchasers, who have acquired an equity to throw prior judgment creditors, in the first instance, on the lands not sold to them; *Averall v. Wade*, Ll. & Goold, *temp.* Sugd. 252; *Hartly v. O'Flaherty*, Beatty, 61; *Aicken v. Macklin*, 1 Dru. & Wal. 621; the principle being this, that the Court will not interfere when the party resisting the marshalling has as good an equity as the party seeking it; *Boazman v. Johnson*, 3 Sim. 377; *Clifton v. Burt*, *sup.* (1 P. Wms. 678).

The equitable jurisdiction to follow assets in the hands of third persons, Following as-
sets. arises from the following principles, viz. :—

A trust will be enforced in Equity not alone against the trustee, but also against every person in possession of the trust property with notice of the trust; *Adair v. Shaw*, 1 Sch. & Lef. 262; and again, at Law the executor in person is considered the debtor; *Farr v. Newman*, 4 T.R. p. 637; but in

All persons accountable for assets in their hands should be parties to suit. Land purchased with assets liable to creditors, &c., of testator.

Purchaser from executor, with notice of misapplication, liable to creditors, &c., of testator;

but not a *bonâ fide* purchaser without notice of misapplication ;

even though the property sold had been specifically bequeathed.

Specific legacy sold by legatee may not be followed.

While fund in Court creditor let in.

Right of credi-

Equity the fund is treated as the debtor, and the object of the Court is first to collect and then to distribute the assets ; and hence it is that all persons who are answerable for any part of the assets received by them, ought to be parties to a bill to administer assets. Thus, when assets have come to the hands of an executor who is dead, the representative of such executor is a necessary party to the bill ; *Cocking v. Golding*, 4 Ir. Eq. R. 169.

Where an executor applies the assets in a purchase of land taken in his own name, the land so purchased is assets, and liable, as was the purchase-money ; but the application of the assets must be shewn by proving the inability of the executor to purchase with his own proper funds, or by producing a written admission of the fact under the executor's hand, or finally, by means of parol evidence ; 3 Sug. Vend. 271 (10th ed.) ; *Wilkins v. Stevens*, 1 Y. & Col. C. C. 431.

So also if an executor should apply a part of the assets to the liquidation of his own proper debt, or for any similar purpose, such application will be set aside, and the purchaser with notice will be decreed to account for the assets come to his hands.

But, subject to this principle, that Equity will not suffer a person who made himself party to a breach of trust, to hold the trust property for his own benefit, it is a rule of Law and Equity that the executor represents the testator, and therefore has absolute power over the whole personal estate, even though specifically bequeathed ; for however it be bequeathed, it must go to the executors, upon trust, in the first place, for payment of debts ; 3 Sug. Vend. 152 (10th ed.) ; and neither creditors nor legatees can follow the assets in the hands of a *bonâ fide* purchaser from the executor, for a creditor has no lien on personal assets ; *Nugent v. Gifford*, 1 Atk. 463 ; and see *M'Leod v. Drummond*, 17 Ves. p. 163. Nor is the purchaser bound to inquire if there are debts still unpaid, for he is warranted in presuming, until he gets notice to the contrary, that the object of the executor in dealing with the assets is to raise money to pay the debts of his testator ; see 5 Jar. Byth. 177 (3rd ed.) Even in the case of a specific legacy (*i. e.*, a bequest of a specified part of the assets ; *Stephenson v. Dowson*, 3 Beav. 342), although the assent of the executor vests in the legatee the legal title, yet the executor may sell the property specifically bequeathed. But if the executor should not exercise this power, and should assent to the legacy, creditors could not follow the property specifically bequeathed after it had passed into the hands of a purchaser from the specific legatee ; *Spackman v. Timbrell*, 8 Sim. p. 260.

Where a suit has been instituted for administration of assets, the Court will permit a creditor to prove his debt at any time while there is a fund in Court to pay him, and that even though the fund has been allocated to legatees ; but in such case the creditor must pay the costs of the re-appportionment ; *Angell v. Haddon*, 1 Mad. 529. See also *Hackett v. Donnelly*, 1 Ir. Eq. R. 231. If the creditor will not come until the residue is actually paid, his remedy against the executor, who has acted under the direction of the Court, is gone ; *Farrell v. Smith*, 2 Ball & B. 337. He may, indeed,

sue the legatees, and make each paid legatee contribute to pay him so much of his debt as will be found to bear the same proportion to his whole debt as the paid legacy bears to the whole amount of the paid legacies; *March v. Russell*, 3 Myl. & Cr. 31; *Gillespie v. Alexander*, 3 Russ. 130; see also *Mannix v. Drinan*, 3 Ir. Eq. R. 119; *Greig v. Somerville*, 1 Russ. & M. 338.

A creditor can make a legatee refund, although the legacy was paid to him voluntarily, and although at the death of the testator the assets were not deficient, and although the executor is still liable to the creditor; see 3 Jar. Byth. 5 (3rd ed.)

An unpaid legatee can make a paid legatee refund, provided the assets were deficient at the death of the testator; otherwise the only remedy is against the executor, who by paying one legacy admits assets to pay all.

An executor may make a legatee refund where the legatee has enforced payment by suit, or where the executor had no notice of debts which appeared after payment of the legacy.

When a Court of Equity takes the administration of the assets into its own hands, by pronouncing a Decree in a creditor's suit, the Court will restrain creditors from proceeding to enforce their rights at Law; *Jones v. Brain*, 2 Y. & Col. C. C. 170; but will, on the other hand, permit them to bring their legal rights with them into the office of the Court of Equity, subject, however, to the following qualifications, viz., a creditor claiming his debt under a decree is required to verify his demand by his affidavit, which is not the case at Law; and secondly, a voluntary bond or other specialty debt will, in Equity, be postponed to the simple contract creditors of the debtor, which would not be so at Law; *Assignees of Gardiner v. Shannon*, 2 Sch. & Lef. 228; *Whitaker v. Wright*, 2 Hare, 310.

A voluntary bond shall, however, be paid out of the surplus, if any, for it is valid as against the debtor if it be supported by a lawful or meritorious consideration; but a bond given in consideration of an immoral act, or conditioned to do an act *malum in se*, is altogether void; *Ram on Assets*, 358 (2nd ed.)

A decree in a creditor's suit does not establish the plaintiff's demand, or dispense with proof of the debt, for all the creditors are not before the Court at the hearing, and yet every creditor has a right to question the claim of every other which may interfere with his own; of course the proof given at the hearing will be proof before the Master, and documents read at the hearing will be received as duly proved in the cause; but if there be any defect in the proof in chief of the plaintiff's demand, any of the creditors (and, it would seem, the executor or other person representing the debtor's estate), may avail themselves of such defect, and may make a new case and go into new evidence on the subject; *Owens v. Dickenson*, 1 Cr. & Ph. 48; *Whitaker v. Wright*, *sup.* (2 Hare, 310).

It is necessary to observe that a creditor or legatee cannot sue a debtor of the estate, there being no privity between these parties, unless a case of collusion between the creditor and the executor can be established; *Uttersson v. Mair*, 2 Ves. Jr. 95; *Alsager v. Rowley*, 6 Ves. 749, 3 Mad. p. 159; *Philips v. Philips*, 6 Ir. Eq. R. 509; or the executor refuses to sue; Lan-

tor to make paid legatee refund.

Unpaid legatee may make paid legatee refund.

Executor may make legatee refund.

After decree in suit to administer assets, creditors restrained from suing.

Effect of such decree on plaintiff's demand.

Creditor or legatee may not sue a debtor to the estate.

- caster *v.* Evors, 4 Beav. 158; or there are special circumstances sufficient to take the case out of the general rule; *Davies v. Davies*, 2 Keen. 534.
- Deficiency of assets defined.** There is a deficiency of personal assets, in the contemplation of a Court of Equity, when the personal assets immediately available are not sufficient to answer debts and legacies; *Clanmorris v. Bingham*, 1 Mol. 514. In case of such deficiency general legacies are subject to a rateable abatement. And an annuity payable out of the general personal estate is considered as a general legacy, though charged upon real estate; *Creed v. Creed*, 1 Dru. & War. 416; and the annuitant is entitled to have a sufficient part of the personal assets appropriated to answer the annuity during its continuance: but if there be a deficiency of assets, the value of the annuity at the testator's death is to be calculated, and the abatement shall be on the amount of such value; *Creed v. Creed*, *supra*. Where a legacy is given to a creditor of the testator in consideration of releasing his debt, or to the widow in lieu of her dower, the legatee will be considered as a purchaser of his or her legacy, and shall not abate in average with the legatees, who are mere volunteers.
- Abatement.**
- Legacies substitutional or cumulative.** Where a testator has given two legacies to the same individual the question arises are they *cumulative* or *substitutional*; see 2 Wms. Ex. 1020 (3rd ed.); 1 Hov. Sup. 186.
- Although the legacies be identical in amount, yet if they be given by different instruments (a will and codicil), the presumption is that they are cumulative, unless an intention appear on the will that the latter gift should be substituted for the former; *M'Kenzie v. M'Kenzie*, 2 Russ. 262; and see *Tweeddale v. Tweeddale*, 10 Sim. 453; *Russell v. Dickson*, 2 Dru. & War. 133; S. C. 4 Ir. Eq. R. 339; see also *Commrs. Char. Don. v. Cotter*, 2 Dru. & Wal. 615. So also where two unequal legacies are given to the same person by the same instrument; *Curry v. Pile*, 2 Bro. C. C. 225.
- As to the admissibility of parol evidence upon a question of this sort; see *Hall v. Hill*, 4 Ir. Eq. R. p. 47; S. C. 1 Dru. & War. 94; *ib.* 353: and as to parol evidence generally; see 1 Jarm. Dev. 349, 852.
- Legacy vested or contingent.** Where a legacy is payable at a future day, the legatee is entitled to have a fund set apart to secure payment when the day shall arrive.
- It is frequently necessary to consider, with respect to a legacy, whether it be vested or contingent; *Saunders v. Vautier*, Cr. & Ph. 240. The Court will give the preference to that construction of a will which is in favour of the vesting of the gift; *Kimberley v. Tew*, 5 Ir. Eq. R. 389; *Butler v. Lowe*, 10 Sim. 317.
- Legacy to A., payable at his age of 21 years, vests at death of testator. It is *debitum in presenti, solvendum in futuro*; *Saunders v. Vautier*, *sup.*; (Cr. & Ph. 240); *Vize v. Stoney*, 1 Dru. & War. 337.
- Legacy to A., at his age of 21 years, is contingent; *Jones v. Mackilwain*, 1 Russ. 220.
- So, legacy to A., if, when, provided, &c., he attain 21, is contingent; *Murray v. Tancred*, 10 Sim. 465.
- Legacy to A., payable at her marriage, is contingent, for *dies incertus conditionem facit*; *Atkins v. Hiccocks*, 1 Atk. 500.

But gift of *interim* interest makes the bequest vested, if there be no bequest over; *Vawdry v. Geddes*, 1 Russ. & M. p. 208.

Legacy to A. at 21, with interest in the meantime, is vested; *Fonereau v. Fonereau*, 3 Atk. 645; and legacy to A. at marriage, with interest in the meantime, is vested; *Booth v. Booth*, 4 Ves. 399; *Vize v. Stoney*, *sup.* (4 Ir. Eq. R. 64; S. C. 1 Dru. & War. 337).

Bequest of £100 to A. for life, and after his death to B. Bequest to B. is vested, being in nature of a remainder; *Blamire v. Geldart*, 16 Ves. 314.

But bequest of the interest of £100 to A. for life, and after his death the principal sum of £100 to B., is contingent; *Billingsley v. Wills*, 3 Atk. 219.

An immediate gift of the fund to a trustee for the legatee, affords evidence of an intention that the bequest shall vest immediately, on the same principle with the gift of *interim* interest, viz., because in both cases the testator intends that the legacy shall immediately be separated from the residue; *Saunders v. Vautier*, *sup.* (Cr. & Ph. 240).

But where the legacy is given over to another in case of the death of the legatee before a particular period, the bequest is necessarily contingent; *Vawdry v. Geddes*, *sup.* (1 Russ. & M. 203).

Legacy to a class, as to the children of A.: those living at death of testator take; *Viner v. Francis*, 2 Cox, 190, and not children born afterwards, even though the words "begotten or to be begotten" be added; *Butler v. Lowe*, *sup.* (10 Sim. 317).

But where distribution of the fund is postponed to a period after testator's death, all the children living at his death, and all who come in *esse* previously to the time of distribution, generally speaking, take vested interests; but not children born after the period of distribution; 2 Wms. Ex. 974, *et seq.* (3rd ed.)

Bequest to A. for life, and after his death to his surviving children: those only take who are living at the death of A.; *Wordsworth v. Wood*, 2 Beav. 25.

Where a legacy is given to A., payable at 21 years, and if he die before 21, then to B, the legacy is vested, but subject to be divested in the event of the death of A. before 21, and therefore A. shall have the interest in the meantime; *Nicholls v. Osborne*, 2 P. Wms. 418.

Where a legacy is given so as to pass a vested interest, that interest will not be cut down to a contingent bequest by subsequent words not necessarily inconsistent with the intention to give a vested interest to the legatee; *Jennings v. Newman*, 10 Sim. 219.

Legacies charged on land are, so far as they are paid out of the real estate, considered as dispositions *pro tanto* of land.

The general rule as to legacies charged on land is, that the time of vesting is the time of payment; hence legacy to A., charged on real estate, to be paid at 21, even though *interim* interest be given, is contingent, for payment is postponed on account of the circumstances of the person; *Poulet v. Poulet*, 1 Vern. 204.

But it is otherwise where payment is postponed for the convenience of the estate charged; 1 Jar. Dev. 756.

A will takes no effect until the death of the testator.

Bill for legacy will not lie until after a year from death of testator.

The executor being allowed twelve months from the testator's death to arrange his affairs, a legatee cannot sustain a bill to enforce payment of his legacy until the expiration of that period.

The bill must seek for a general account of the assets; but if the executor will admit assets sufficient to pay the legacy, that admission will warrant a decree against him; see Mitf. Pl. 168 (4th ed.); and although one executor should admit assets, yet the usual accounts may be decreed as against the other executors.

The executor represents the testator, and therefore, to a bill to recover a legacy out of personal estate, no legatee other than the plaintiff need be made a party, not even the residuary legatee.

But if the legacy be charged on real estate, then all the other legatees seem necessary parties to a bill to raise the legacy by a sale, as well as to a bill of foreclosure; *Calverly v. Phelps*, 6 Mad. 229; but on this subject see *ante*, pp. 301-2.

And to a bill by one of several residuary legatees, all other persons interested in the residue must be made parties.

The personal representative of a deceased executor may be made a co-defendant with a surviving executor, provided the deceased executor received assets, but not otherwise; *Cocking v. Golding*, *sup.* (4 Ir. Eq. R. 169); *Holland v. Prior*, 1 Myl. & K. 237.

There can be no account had of the personal estate without the general personal representative; a limited administration will not, therefore, be sufficient. There should be a prerogative probate, or grant of administration; *Young v. Elworthy*, 1 Myl. & K. 215; and the mere right to obtain probate or administration is not enough; *Humphreys v. Ingledon*, 1 P. Wms. 752; *Humphreys v. Humphreys*, 3 P. Wms. 349.

Legacy to a married woman.

A legacy bequeathed to a married woman may be paid to her husband, whose release will be a sufficient discharge to the executor; but if the legacy should exceed the sum of £200, then the executor may refuse payment to her husband until he shall have made a suitable settlement on his wife, or until the wife shall have appeared in court and waived her equity by consenting that her husband should receive the legacy, in which case the Court will require to be satisfied by affidavit that no prior settlement of the fund existed.

Legacy to an infant.

A legacy bequeathed to an infant cannot with safety be paid to him or to any one for him during the infancy of the legatee; *Dagley v. Tolferry*, 1 P. W. 285; unless the bequest be to a trustee for the infant; *Cooper v. Thornton*, 3 Bro. C. C. 96. But where the legacy is vested, and the parents of the infant legatee are unable to maintain him, the executor may safely apply a competent part of the *interest* of the legacy to the maintenance of the minor: for this the Court would do on an application made for the purpose; *Ex parte Dudley*, 1 Jac. & W. 254, n. (b); and the Court

will protect an executor in doing what it would order ; 7 Ves. p. 150 ; 4 *ib.* 369.

By the Statute 54 Geo. III. c. 92, it is in substance enacted, that where Statute authorizing payment of legacy into bank. by reason of the infancy or absence beyond sea of a legatee or person entitled to a residue of personal estate, or by reason of any doubt as to the construction of a will, the executor or administrator cannot pay the legacy or residue, the money, after deducting legacy duty, may be paid into the Bank of Ireland, with the privity of the Accountant-General, to the credit of the party interested, which payment shall be a sufficient discharge to the executor or administrator ; and the Accountant-General shall invest in stock the money so paid in, and the dividends of such stock as they shall become due ; and the stock and dividends shall be paid and applied as the Court of Chancery shall direct ; see *Whopham v. Wingfield*, 4 Ves. 630 ; *Wilson v. Brownsmith*, 9 Ves. 180.

The Statute 1 Will. IV. c. 65, s. 32, provides, that the Court of Chancery may direct dividends of stock belonging to infants to be applied for their maintenance and education.

In bequests of annuities the question frequently occurs, whether or not Bequest of annuities. the annuity be perpetual, upon which subject the rule seems to be, that nothing passes beyond a mere life interest (*Savery v. Dyer*, Amb. 139), unless there be words expressly shewing an intention to give a perpetual interest in the annuity, or a reference to some fund, the income, interest, or produce of which is to be applied in payment of the annuity ; *Blewitt v. Roberts*, 1 Cr. & Ph. 274 ; *Heron v. Stokes*, 2 Dru. & War. 89 ; S. C. 4 Ir. Eq. R. 284 ; and see *Ashton v. Adamson*, 1 Dru. & War. 198.

It has been long held, that a gift of the income or produce of a fund, without limit as to time, is equivalent to a gift of the entire interest ; *Elton v. Shephard*, 1 Bro. C. C. 532 (and see *Philipps v. Chamberlaine*, 4 Ves. 51 ; *Page v. Leapingwell*, 18 Ves. 463) ; for such a gift amounts to a dedication of the fund to the object specified.

Though the Statutes of Limitation could not, before the Statute 3 & 4 Legacies how affected by Statutes of Limitation. Will. IV. c. 27, be pleaded in bar to a suit for a legacy, yet the lapse of 20 years without any demand would, if not explained satisfactorily, have furnished a presumption of payment ; see *Campbell v. Graham*, 1 Russ. & M. 453. But now, by the 40th section of the above-mentioned Act, money charged on land and legacies are to be deemed satisfied at the end of twenty years, if there shall be no interest paid or acknowledgment in writing in the meantime.

A residue bequeathed by will is clearly within this section ; *Prior v. Horniblow*, 2 Y. & Col. (Ex.) 200 ; and legacies payable out of personal estate alone are also within it ; *Sheppard v. Duke*, 9 Sim. 567 ; see also *O'Hara v. Creagh*, Longf. & T. 65 ; *Portlock v. Gardner*, 1 Hare, 594. But if the legacy were severed from the personal estate and made a trust fund, the 40th section of the Act would not preclude the *cestui que trust* from receiving it ; *Phillipo v. Munnings*, 2 Myl. & Cr. 309 ; for the Statute does not bar a suit to compel a trustee to account, when the relation of trustee and *cestui que trust* continues ; *Wedderburn v. Wedderburn*, 2 Keen,

722-749; S. C. 4 Myl. & Cr. p. 52; Ward v. Arch, 12 Sim. 472. And where this 40th section applies, the twenty years will not begin to run until there is a person entitled to receive, and capable of giving a discharge; for instance, in case of legacy to an infant, the legatee has twenty years from the time he attained his age; Piggott v. Jefferson, 12 Sim. 26-7.

A trust to pay debts created by the executor will not prevent the operation of the 40th Section in barring a legacy given by the executor's testator; Piggott v. Jefferson, *supra*.

It is clear that a trust for payment of debts and legacies, created by a will of personal estate, has no effect whatever; it does not alter the liabilities of the parties as they existed independently of such trust. The law vests the personal estate in the executor, upon trust for the creditors and legatees; the trust, therefore, is merely inoperative so far as the personal estate is concerned, and will not prevent the operation of the Statute of Limitations; Scott v. Jones, 4 Cl. & F. 382; Freaake v. Cranefelt, 3 Myl. & Cr. 499; Howlett v. Lambert, 2 Ir. Eq. R. 254.

A trust for payment of legacies created by a will of real estate seems also inoperative in preventing the bar of the 40th section of the late Limitations' Act. Whether the will giving the legacy create a trust for its payment or not, the legacy will be deemed satisfied at the end of twenty years; Knox v. Kelly, 6 Ir. Eq. R. 279; St. John v. Boughton, 9 Sim. 219.

But as to debts the case is somewhat different. The effect of the creation of the trust is to charge the real estate with payment of all debts not barred by length of time at the testator's death; Burke v. Jones, 2 V. & B. 275. The creditors thus acquire a new right, which may at any time within twenty years from the testator's decease be enforced by a bill for execution of the trusts of the will; see Cockburne v. Wright, 6 Ir. Eq. 1; Crallan v. Oulton, 3 Beav. 1; although the debts, as such, might be barred in six years from the time when the cause of action arose.

We have already observed (*ante*, p. 326), that unless the defendant claims the benefit of the Statute of Limitations by answer, plea, or demurrer, (Hoare v. Peck, 6 Sim. 51; Lynch v. Musgrave, 1 H. & Jones, 821), he cannot insist on it in bar of the plaintiff's demand; Harrison v. Borwell, 10 Sim. 380; Prince v. Heylin, 1 Atk. 494; Mitf. Pl. 273 (4th ed.); and where the defendant, instead of relying on the Statute by plea or demurrer, had filed a long answer, the bill was dismissed without costs; Sanders v. Benson, 4 Beav. 350.

Trust to pay debts.

I. By devise to trustees.

A trust of real estate for payment of debts and legacies may be created in various ways, as, by devising the estate to trustees upon trust to pay the debts and legacies.

The Pleader will often find it difficult to ascertain the estate or interest taken by the trustees when the will was made prior to the first day of January, 1838, in which case it is not regulated by the late Act for amending the Law of Wills (see *post*).

Estate of trustees.

The following are some of the leading principles upon this subject:—

Devise to trustees and their heirs, or to trustees, without words of limitation, will give them an estate commensurate with the exigencies of the

trust ; they will take the fee if the execution of the trust require it ; for example, when the trust is to sell the lands ; *Murthwaite v. Jenkinson*, 2 B. & Cr. 357 ; or to convey them ; *Booth v. Field*, 2 B. & Ad. 564 ; or to pay over the rents ; *Robinson v. Grey*, 9 East, 1 (not merely to permit and suffer the rents to be received ; *Doe d. Leicester*, 2 Taunt. 109 ; *Gregory v. Henderson*, 4 Taunt. 772) ; or to pay annuities out of the lands ; *Rees v. Williams*, 2 Mees. & Wels. 749 ; or to pay taxes and keep in repair ; 2 Wms. Saund. 11, c. n.

In some cases the trustees have been held to take a limited estate in fee, determinable on the raising of a charge created by the will ; *Glover v. Monckton*, 3 Bing. 13 ; or restricted to the minority or coverture of a party under disability ; *Nash v. Coates*, 3 B. & Ad. 839.

A limitation to trustees and their heirs, may by construction be cut down to an estate of freehold, when that estate will be sufficient for the execution of the trust, as where the lands are devised to trustees and their heirs to preserve contingent remainders expectant upon the determination of estates for life ; *Doe d. Compere v. Hicks*, 7 T. R. 433 ; so also where the object of the testator is to secure to a married woman, during her husband's life, a separate allowance ; *Hawkins v. Luscombe*, 2 Sw. p. 391 ; *Doe d. Woodcock v. Barthrop*, 5 Taunt. 382.

When cut down to freehold estate.

The trustees take a chattel interest, not only where their estate is limited to a term of years, but also where the land is devised to them until debts are paid, or where land is devised to executors for payment of debts ; *Co. Lit.* 42, 43 ; *Cordal's case*, *Cro. Eliz.* 316.

When trustees take chattel interest only.

But now in respect to wills made subsequently to the 1st January, 1838, by the Statute 1 Vict. c. 26, s. 30, real estate devised to a trustee or executor shall be construed to pass the fee, unless it be given expressly, or by implication, for an estate of freehold, or for a term of years.

Late Statute to amend the Law of Wills as to devises to trustees.

A trust for payment of debts and legacies may be created by the testator charging his real estate with the payment of them ; *Ball v. Harris*, 4 Myl. & Cr. 264 ; *ib.* p. 482 ; *Shaw v. Borrer*, 1 Keen, 559 ; or by devising the estate to trustees charged with debts ; but this will not vest an estate in the trustees if they are not directed to pay the debts, or required to be active in execution of the trust ; *Kenrick v. Beauclerk*, 3 B. & P. p. 178.

II. By charging real estate with debts.

A trust for payment of debts and legacies may be created by a direction for payment of debts, given by the testator in the introductory part of his will ; *Clifford v. Lewis*, 6 Mad. 33 ; 5 Jar. Byth. 140 (3rd ed.) ; 2 Jarm. Dev. 512-520. And even though the disposition of the property precede the direction for payment of debts, yet if there be in the will no disposition of the personal estate, nor any appointment of an executor, the direction will amount to a charge of the real estate, and therefore create a trust for payment of the debts ; *Harding v. Grady*, 1 Dru. & War. 430.

III. By direction to pay debts.

Where a testator, in any part of his will, directs his debts to be paid by a particular devisee, whatever is given by the will to that person is, by such direction, charged with the debts, and a trust is created by implication for this payment ; *Lamphier v. Despard*, *sup.* (4 Ir. Eq. R. 334-336 ; S. C. 2 Dru. & War. 59) ; *Harding v. Grady*, *supra*.

Statute making real estate assets for payment of simple contract debts ;

With respect to persons who have died or shall die subsequently to the 29th August, 1833, it is enacted, as we have seen, that their real estate shall be assets in Equity for payment of their simple contract debts, provided that creditors by specialty in which heirs are bound are to be paid under this Act before creditors by simple contract ; Statute 3 & 4 Will. IV. c. 104.

This Act has no bearing upon a charge of legacies, and as to debts, it applies only to estates not charged by will ; *Mirehouse v. Scaife, sup.* (2 Myl. & Cr. p. 708), 4 Myl. & Cr. p. 268.

does not charge the debts on the estate.

Purchaser of land charged how far to look to application of purchase-money.

Under this Statute the creditors have no lien on the estate ; therefore up to the time of bill filed by a creditor, the heir or devisee may sell, discharged of debts by simple contract ; and even though the debts be charged by will of the debtor, still the lien on the land will not enable the creditor to follow the land when sold ; for the rule is, that where there is a general unlimited charge for payment of debts, or of debts and legacies, the purchaser is not bound to see to the application of the purchase-money ; *Ball v. Harris, sup.* (4 Myl. & Cr. p. 268) ; 3 Sug. Vend. (10th ed.) 154 ; and this rule has reference to the state of things at the testator's death ; therefore if the debts are afterwards paid, leaving the legacies charged, that circumstance will not vary the rule ; *Eland v. Eland*, 4 Myl. & Cr. 420.

But if the trust be limited, as, for payment of legacies only, or of specified debts, the purchaser of freehold property is bound to see that his money is duly applied ; 3 Sug. Vend. 153 (10th ed.) But now payment to, and the receipt of the trustee, will discharge the person paying from seeing to the application, unless the contrary be declared by the instrument creating the trust ; 7 & 8 Vict. c. 76, s. 10.

Before dismissing the subject of the Statutes of Limitation it may be proper to refer to those which relate to suits at law for recovery of simple contract and specialty debts.

Limitation of actions in case of simple contract debts.

The 10 Car. I., sess. 2, c. 6, Ir., enacts in substance, that actions on the case, actions of account, and actions for trespass, debt, or on contract without specialty, &c., shall be brought within *six* years after cause of action, or removal of disability, and not after.

"Tenterden's Act."

The 9 Geo. IV. c. 14, s. 1, commonly called "Lord Tenterden's Act," enacts, that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise shall be deemed sufficient to take the case out of the last-mentioned Act, unless such acknowledgment or promise shall be in writing, signed by the party chargeable thereby, with a saving as to the effect of payment on account ; and no joint contractor, executor, or administrator, shall be chargeable by reason of written acknowledgment or promise made and signed by any other of them.

Sec. 5 provides, that confirmation of promises by infants after coming of age must be in writing signed by them.

Sec. 6 provides, that guarantees shall be in writing signed by the party to be charged.

This Statute was not intended to alter the nature of an acknowledgment, but merely to require certain evidence of it ; see *Haydon v. Williams*, 7 Bing. 163.

Since this Act, after the six years have elapsed nothing will revive the debt except an acknowledgment in writing, from which a promise to pay can be inferred; or a part payment of principal or interest.

The acknowledgment must not only be in writing, but be signed; *Trentham v. Deverill*, 3 Bing. N. C. 397; and that by the debtor himself, and not merely by his agent; *Hyde v. Johnson*, 2 Bing. N. C. 776.

Since Lord Tenterden's Act the existence of an item within six years in an open account will not take the preceding portion of the account out of the Statutes; *Cottam v. Partridge*, 4 Scott, N. R. 819; see also *Foley v. Hill*, 1 Ph. 399.

But where an account has been stated and a balance struck, this constitutes a new cause of action; *Ashby v. James*, 11 Mees. & W. 542.

A clear written acknowledgment signed by the executor within six years before bill filed, will entitle the plaintiff, a simple contract creditor, to a decree in a creditor's suit; *Smith v. Poole*, 12 Sim. 17; *Purdon v. Purdon*, 10 Mees. & W. 562.

But in the case of *Putnam v. Bates*, 3 Russ. 188, it was held that an admission of the debt by the executor of a trader, within six years before a creditor's bill was filed, did not take the case out of the Statute of Limitations, so as to give the plaintiff the benefit of the Statute 47 Geo. III. which made the real estate of a trader liable to his simple contract debts; and on the same principle it would appear that an acknowledgment by an executor could not, to the prejudice of the heir or devisee, give a simple contract creditor the benefit of the late Statute, which made the real estate of his debtor assets for payment of his demand.

With respect to the sufficiency of the acknowledgment, see *Gardiner v. McMahon*, 2 Gale & Dav. 593; *Spong v. Wright*, 12 Law Journal (Ex.), N. S. 144. See further *Martin* on Lord Tenterden's Act, and *Shelford's Real Property Statutes* (4th ed.) 237.

The 3 & 4 Vict. c. 105, s. 32, enacts, as we have seen, that actions of debt for rent on an indenture of demise, covenant, or debt upon any bond or specialty debt, or *scire facias* upon recognizance, shall be brought within ten years from the Act, or within twenty years after the cause of action, and not after. Limitation of actions in case of specialty debts.

And that debt on an award, when the submission is not by specialty, shall be brought within three years after the Act, or six years after the cause of action, and not after.

The foregoing section has put an end in cases arising after the Act came into operation, to the much agitated question whether the 3 & 4 Will. IV. c. 27, s. 42, applied to cases of rent reserved on an indenture of demise.

With respect to charitable bequests, the law in Ireland is somewhat different from that in England. Charitable bequests.

Alienations in mortmain, as it is termed, that is, gifts of lands to religious or other corporations, are prohibited by the Statute Law of both countries; see 1 Gab. Dig. 507, 2 Bl. Com. c. 18, p. 268, *et seq.* But a devise to a corporation in trust for a private person or a charity, though void at Law, is good in Equity; *Incorp. Soc. v. Richards*, 1 Dru. & War. 258.

No Mortmain
Act in Ireland.

How far such
bequests fa-
voured.

The Statute 9 Geo. II. c. 36, Eng., commonly, though inaccurately, termed the Statute of Mortmain, prohibits devises, for charitable uses, of *lands* and property which savours of *realty*, such as chattels real.

There is no analogous Act in Ireland; 1 Dru. & War. p. 331; the consequence of which is, that in Ireland a man may, not merely by Act *inter vivos*, but by his will, dispose of his *lands*, as well as his personal property, to charitable objects; Attorney-General v. Power, 1 Ball & B. p. 154; Com. of Char. Don. v. Cotter, 2 Dru. & Wal. 615; and devises or bequests for charitable purposes are so far favoured, that they form an exception to an established Rule of Equity, namely, that a trust will not be enforced unless the objects of it (*the cestui que trusts*) be certain; Cruys v. Colman, 9 Ves. 319.

Thus, bequest of £1000 for *charitable purposes* to be specified in a codicil, though no codicil be added, yet is a good bequest; Attorney-General v. Syderfen, 1 Vern. 224; Comrs. of Don. v. Sullivan, 1 Dru. & War. 501; S. C. 4 Ir. Eq. R. 280; but bequest of £1000 for such *persons* as should be specified in a codicil, is void for uncertainty if no codicil should be added; Mills v. Farmer, 1 Mer. p. 82. And further, where the charitable gift cannot be applied in the particular *mode* suggested by the testator, the trust will be executed *cy pres*, and the gift will be applied to a charitable object, consistent, so far as may be, with the object of the testator; 10 Jar. Byth. 35, (2nd ed.) and cases there; 1 Mer. 95; Attorney-General v. Coopers' Company, 3 Beav. 29.

If trustees be named, then the Court of Equity has jurisdiction to control the discretion of the trustees with respect to the application of the fund; Moggridge v. Thackwell, 7 Ves. 36; Reeve v. Attorney-General, 3 Hare, 191. But if no trustee be named, the right to dispose of the fund rests in the Crown as *parens patriæ*, and shall be made according to directions given under the Sign Manual; Price v. Abp. of Canterbury, 14 Ves. 364; Ommanney v. Butcher, T. & Russ. p. 270.

The jurisdiction of Courts of Equity to enforce gifts for charitable purposes existed prior to any enactment on the subject; Incorporated Society v. Richards, 1 Dru. & War. p. 320. It is important, however, to be observed, that the Courts have affixed a technical meaning to the word *charitable*, and will not execute a trust in favour of a *charitable* use as such, if the trustee might, consistently with the intention, and without being answerable for misapplication, appropriate the fund to purposes not charitable, according to this technical sense of the word; Ellis v. Selby, 1 Myl. & Cr. 286.

Charitable purposes, according to the construction of the Courts of Equity, mean those specified in the Statute 43 Eliz. c. 4, Eng., or purposes analogous to the purposes therein specified.

The charities mentioned in that Statute are:—

1. The relief of the poor, aged, and impotent.
2. The relief of the sick, prisoners, orphans, &c.
3. For supporting free schools.
4. For repairing bridges, churches, and highways.
5. For aiding poor inhabitants to pay taxes.

Lord Hardwicke's definition of charitable donations, as exemplified by the cases in this Statute, is, a gift to a general public use ; Ambl. p. 652. Technical meaning of a charitable gift.

Charity, in this sense, extends to the rich as well as to the poor. A bridge, church, or highway, is a public benefit of which all ranks partake ; Gort v. Attorney-General, 6 Dow. 136.

Again, charity extends to purposes of religion and piety ; for example, a bequest to be employed for the advancement of the Christian religion among infidels, will be supported as a charitable purpose ; Attorney-General v. City of London, 1 Ves. Jr. 243 ; see also Powerscourt v. Powerscourt, 1 Mol. 616. So, a devise for the purpose of promoting scriptural education at A ; Comrs. Char. Don. v. Cotter, 2 Dru. & Wal. p. 618 ; and see 10 Jar. Byth. 25 (2nd ed.), several other gifts which have been adjudged to be charitable.

But, on the other hand, a bequest to be applied in *private* charity is not that which the Courts consider a charitable purpose ; Ommanney v. Butcher, *sup.* (T. & Russ. 260). Nor a bequest for purposes of benevolence ; Morice v. Bp. of Durham, 9 Ves. 399 ; 10 Ves. 522 ; James v. Allen, 3 Mer. 17 ; and see 1 Hov. Sup. 188. For in these and other such cases the trustees might apply the fund to purposes not specified in the Statute 43 Eliz., nor analogous to the purposes therein, and yet not be answerable for mal-administration ; the trust is therefore too indefinite to be controlled by the Court, and results to those to whom the law would give the property if undisposed of ; see Ellis v. Selby, *supra* (1 Myl. & Cr. 256).

There is no Statute in Ireland precisely corresponding to the Statute 43 Eliz. But the Courts of Equity in Ireland have adopted that Statute for the purpose of determining what is a charitable purpose ; 1 Mol. p. 618 ; and the Statute 10 Car. I. S. 3, c. 1, Ir., is very similar, and indeed has been said to have been moulded on the English Act, and to have given to Ireland whatever that Act has given to England ; but the Irish Act goes further than the English with respect to the liberal arts, and the former includes trusts for the maintenance of any minister of the Word of God, which are not found in the English Act ; see 1 Dru. & War. p. 324 ; S. C. 4 Ir. Eq. R. 177. In accordance with this view, Courts of Equity in this country may probably look to the Irish Act in determining what is a valid charitable gift.

The Irish Stat. as to charitable bequests.

By the Statute 3 Geo. III. c. 18, Ir., amended by 40 Geo. III. c. 75, Ir., executors and administrators were required, within three months after probate or administration granted, to publish every charitable donation in the will of their testator in the Dublin Gazette.

The Statute 40 Geo. III. c. 75, appointed and incorporated Commissioners of Charitable Donations to sue for such donations when withheld, concealed, or misapplied, and to apply them according to the donor's intention, or as nearly thereto as practicable ; see 2 Dru. & Wal. 615. But now the Statute 7 & 8 Vict. c. 97, repeals both these Acts, save as to anything done before the commencement of that Statute.

By the Statute 1 & 2 Geo. IV. c. 92, s. 1, persons in whom lands, &c., are vested, subject to any trust for charitable purposes, may convey such lands, &c., in exchange for others, under restrictions therein.

The Statute 52 Geo. III. c. 101, enacts, that in cases of breach of trusts created for charitable purposes, or whenever the direction of a Court of Equity shall be deemed necessary for administration thereof, a petition may be presented to the Chancellor, &c., who shall hear the same; the petition to be certified by the Attorney or Solicitor-General.

See *ex parte* Skinner, 2 Mer. 453; *Ex parte* Berkhamstead Free School, 2 V. & B. 134; *Ex parte* Rees, 3 V. & B. 10.

Latest Statute
respecting cha-
ritable dona-
tions.

The Statute 7 & 8 Vict. c. 97, entitled "An Act for the more effectual Application of Charitable Donations and Bequests in Ireland," incorporates "the Commissioners of Charitable Donations and Bequests for Ireland," and provides (sec. 6), that when the object of a charitable donation or bequest is not defined with certainty in the instrument creating the trust, the question shall be referred to a Committee of the Commissioners, who shall give effect to the donation or bequest, according to the certificate of such committee, but without prejudice to the jurisdiction of any Court of Law or Equity.

Sec. 11 vests in the Commissioners under the last Act the property vested in the former Commissioners under the 40 Geo. III. c. 75.

Sec. 12 empowers the Commissioners under the Act of the Queen, to sue for recovery of charitable donations withheld, concealed, or misapplied, and to apply same, when recovered, according to the intention of the donors, deducting law expenses; but no proceedings to be instituted without permission of the Attorney or Solicitor-General for Ireland.

Sec. 15 provides that persons or bodies corporate may by deed executed by two witnesses, or by will in writing, duly executed, vest in the Commissioners any estate or interest in lands, tenements, hereditaments, goods, and chattels, in trust for building, enlarging, upholding, or furnishing any chapel or place of religious worship of persons professing the Roman Catholic religion, or in trust for any Archbishop or Bishop, or other person in holy orders, of the Church of *Rome*, officiating in any district, or having pastoral superintendence of any congregation, or for building a residence for his and their use. Such estate or interest to be held by the Commissioners, subject to the trusts created by the deed or will, without any further license; provided that no devise or bequest in favour of any religious Order or Society of the Church of *Rome*, bound by monastic or religious vows prohibited by the Statute 10 Geo. IV. c. 7, shall be thereby rendered lawful.

Sec. 16 provides, that after the commencement of the Act (1st January, 1845), no donation, devise, or bequest for pious or charitable uses in Ireland shall be valid to create or convey any estate in lands, &c., for such uses, unless the instrument containing same shall be duly executed three calendar months at least before the death of the person executing same, and unless such instrument, not being a will, shall be duly registered in the Office for Registry of Deeds within three calendar months after its execution.

Sec. 17 provides, that the Archbishops, &c. shall have no power to alien, demise, or incumber property devised to them; but sec. 18 empowers the Commissioners, with consent of such Archbishop, &c., to demise, subject to restrictions therein mentioned.

Sec. 19 provides, that the Vicar-General or his Surrogate, and the Registrar of the Prerogative Court, shall make a yearly return to the Commissioners, on oath, of every charitable devise or bequest contained in any will entered in their respective offices; and executors or administrators obtaining probate or administration are bound within three months after obtaining same, to advertise in the Dublin Gazette three times successively every charitable devise or bequest contained in such will, in manner therein mentioned.

A suit in respect to a public charity is frequently in the shape of an information by the Attorney-General, by and at the relation of the person who suggests the suit, but the Attorney-General is the party prosecuting the cause; *Attorney-General v. Ironmongers' Company*, 1 Cr. & Ph. 208. The only difference between an information and a bill in Equity consists in the form in which the matter is brought before the Court; Mitf. Pl., p. 99-100 (4th ed.) For several precedents of informations see 1st Van Heythuysen, 585, *et seq.*; and see *post*.

Information in respect to a public charity.

In suits concerning a charity it is not unusual to give all parties costs as between solicitor and client; *Gaffney v. Hevey*, 1 Dru. & Wal. p. 25.

Costs.

The Commissioners of Charitable Donations frequently originate the proceedings in a suit respecting a charity fund: if not plaintiffs they should be made parties defendants.

The Attorney-General is a necessary party to all suits respecting charitable funds, save where the fund consists of a legacy given to the treasurer &c., of a charitable institution; even where they are trustees with large discretionary powers, still the King, *as parens patriæ*, by his Attorney-General, is entitled to superintend the charity; *Wellbeloved v. Jones*, 1 S. & Stu. 40.

Cases of charity were not within the Statutes of Limitation, nor bound by the analogy which Equity applied to other cases previously to the late Act 3 & 4 Will. IV. c. 27, and in that Act there are no express words to include charities, which seem to have been overlooked; *Incorp. Society v. Richards*, 1 Dru. & War. p. 288; see also *Attorney-General v. Persse*, 2 Dru. & War. 67.

Charitable bequests how affected by the Statutes of Limitation.

If land given for charitable purposes should be aliened, the *onus* will lie on the alienee, at any distance of time, to prove that the alienation was beneficial to the charity; *Attorney-General v. Brettingham*, 3 Beav. 91.

For precedent of a bill to carry into execution a trust for charitable purposes, see *post*.

Where personal property of a perishable nature (as leasehold), is bequeathed to several persons in succession, in the way of tenants for life and remainder-men, the general rule is, that the property must be converted into Government Stock; and even though the conversion be not made, yet as Equity considers that done which ought to have been done, the tenant for life will be entitled not only to the income of the property in its unconverted state, but to the income which it would have yielded if it had been converted into Government Stock: and the reason of this rule is, that the Court considers not the interest of the tenant for life only, but the common interest of all the legatees of the fund, the remainder-men being the objects of the

Legatee for life.

Constructive conversion.

testator's bounty, so far as their interests extend, as well as the legatee for life; *Howe v. Dartmouth*, 7 Ves. 137; *Lichfield v. Baker*, 2 Beav. 481; and the application of this principle operates to the protection of the legatee for life, where the property is a reversionary interest producing no present profit; for in such case the tenant for life will be entitled to the income of the Government Stock produced, or which might have been produced by the sale of the reversionary interest, and investment of the purchase-money. If the executor suffer the legatee for life to receive the income of the property as it stood at the death of the testator, whereby the remainder-men are damaged, he will be accountable to them for the excess of income paid to the legatee for life; *Dimes v. Scott*, 4 Russ. 195; *Mehrtens v. Andrews*, 3 Beav. 72.

The right of the legatee for life of the fund commences usually from the death of the testator; *Fearns v. Young*, 9 Ves. 549; *Angerstein v. Martin*, 1 T. & Russ. 232; *ib.* 241. But for the purpose of fixing the income, the time of the constructive conversion, *i. e.*, the time at which the conversion ought to be made, and will therefore be supposed to have been made, is the expiration of one year from the testator's death; *Dimes v. Scott*, *sup.* (4 Russ. p. 209).

When not applied.

The apparent intention of the testator to give something to each of the successive legatees, being the principle upon which this doctrine of constructive conversion rests, it is obvious that where there is no direction for conversion, but, on the contrary, a manifestation of intention that the legatee for life shall enjoy the property in *specie*, in its existing state, *there no conversion*, either actual or constructive, shall take place, but the legatee shall, during his life, have the whole income of the fund; *Alcock v. Sloper*, 2 Myl. & K. 699.

Thus, in the case of a specific bequest of a part of the testator's property to one for his life, and, after his death, to another, the first legatee shall have the entire use or income of this fund. So, when the testator bequeathed his property, however situated, to his wife for life, and after her death to be divided, &c., this was held to be a sufficient indication of intention that the wife should enjoy the property in *specie*; *Collins v. Collins*, 2 Myl. & K. 703; *Pickering v. Pickering*, 4 Myl. & Cr. 289.

Where the property bequeathed at the death of the testator is invested on real security, the Court would not permit the money to be called in without an inquiry whether it would be for the benefit of every person interested; and until the money is called in, the tenant for life will be entitled to the entire income arising from the investment; see 7 Ves. p. 150; *Caldecott v. Caldecott*, 1 Y. & Col. C. C. 312.

Right of executor to residue;

The question whether a residue undisposed of by the testator shall go to the executor or to the next of kin, is one which so frequently occurs, and has proved so fruitful a source of litigation, as to induce the interference of the legislature.

If testator died since 1st Sept. 1830.

The Statute 1 Will. IV. c. 40, is, in substance, as follows:

"Whereas testators frequently appoint executors without making any express disposition of the residue of their personal estate, and whereas execu-

tors so appointed become by law entitled to the whole residue, and Courts of Equity have so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appear to have been the testator's intention to exclude them from a beneficial interest therein, in which case they are held to be trustees for the persons who would be entitled under the Statute of Distributions if the testator had died intestate, and whereas it is desirable that the law should be extended in that respect, be it enacted, &c. :

" That when any person shall die after the first day of September, 1830, having by will appointed an executor, such executor shall be, in Equity, a trustee for the persons who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will that the executor was intended to take the residue beneficially."

It is a singular circumstance that about one hundred years previous to the foregoing enactment, a bill was brought into the House of Lords, by Lord King, to take away the equitable rule, and to give the residue to the executor in *Equity* as well as at *Law*, wherever it was not expressly taken away from him. This bill was not carried through the House of Commons.

In tracing the subject through the numerous subsequent decisions, there appears to be a gradual tendency towards favouring the claim of the next of kin; see *Browne v. M'Guire*, Beatty, p. 365. At length the foregoing Statute was passed, which is just the reverse of Lord King's bill, and excludes the title of the executor to the undisposed-of residue, unless it appear by the will that the executor was intended to take beneficially. But this Act does not apply to cases where the testator died before 1st September, 1830.

If testator died
before 1st Sep.
1830.

The Rule of Equity which was extended by this Act, and which still governs cases not within it, seems to be, that the title of the executor to the undisposed-of residue shall prevail, unless it appear by the will that the executor was not intended to take beneficially. Thus the right of the executor is excluded wherever the property is given to him expressly *in trust*, or where there is sufficient indication of intention that the testator meant only to give *the office*, and thereby impose a *burden* and not confer a *benefit*.

So also where a legacy is given to the executor he shall not have the residue, for the gift of a part is inconsistent with the intention to give the whole, unless where unequal legacies are given to two executors, or a legacy to one of several executors, there the testator may have intended to give a preference to the favoured executor.

So also where there is a residuary clause which is inoperative for any reason (as, for instance, where the name of the residuary legatee is struck out, or a blank for his name not filled), the executor's right is barred, for he takes not what is undisposed of, but only, at the most, what was not *meant* to be disposed of; and for the same reason the executor will not take a lapsed legacy or a revoked bequest. For the several cases upon this subject, see 2 Wms. Exors. 1166 (3rd ed.); 1 Hov. Sup. pp. 28 and 140.

Where co-executors take a residue in that character, they take as joint-tenants; *Griffiths v. Hamilton*, 12 Ves. 298. The residue is that which remains after payment of debts, legacies, and the costs of administering the estate; and therefore the costs incurred in ascertaining the persons entitled to the residue shall be paid thereout; *Shuttleworth v. Howarth*, 1 Cr. & Ph. 228.

Some only of the next of kin of testator may, without making the others parties, contest the right of the residuary legatee; *Caldecott v. Caldecott*, Cr. & Ph. 183.

Intestate's
real estate.

In framing bills to administer the assets of an intestate, the Pleader ought to be familiar with the rules that regulate the transmission of the property of a person who dies intestate.

And first, as to his real estate.

The law of descent has been altered with respect to the estates of those intestates who have died since the close of the year 1833.

For the law of inheritance, in cases not within the recent Statute, the reader is referred to 2 Bl. Com. Ch. 14, p. 200. Bac. Abr. Com. Dig. Descent. Watk. on Descents.

The Statute 3 & 4 Will. IV. c. 106, enacts,

Act to amend
the law of inheritance :-

Sec. 2. *Descent shall be traced from the first purchaser; but the person last entitled shall be considered the purchaser, until the contrary be proved; and the last person from whom the land shall be proved to have been inherited shall be considered to have been the purchaser.*

In tracing a title by descent under this Act, the material inquiry is, not who was last seised, but who was last entitled to the land, for he shall be assumed to be the purchaser; but, notwithstanding this provision, it seems the *onus* of proving that the person assumed to be the purchaser really was so, still lies on the vendor; 2 Sug. Vend. 230 (10th ed.)

Sec. 3. *An heir to whom land is devised by his ancestor, shall take as devisee by purchase, and not as heir by descent.*

Note the difference between title by descent and title by purchase. Land taken by descent from an ancestor or cousin, vested in the heir by operation of law, independently altogether of his own act or consent; it is descendible not to the blood of the heir without restriction, but only to the blood of the first purchaser, and descends to the heir charged with incumbrances created by the ancestor; Cru. Dig. tit. 30, s. 4.

By the old law the heir took by descent where the will of his ancestor gave him the same estate as the law gave him, and so the will was void as to him.

But even where the testator died previously to the year 1834, so that the old law governed the case, it has been held, that notwithstanding the doctrine that the heir who is devisee shall take by descent, yet the heir shall have contribution from the other devisees, to the extent in which an estate devised to him may be exhausted by debts of the testator; *Biederman v. Seymour*, 3 Beav. 368.

Sec. 3. *Limitation, in any assurance executed after 31st December, 1833, to the grantor or his heirs, shall create an estate by purchase.*

By the old law a limitation to the heirs of the grantor was inoperative, for the heirs would take the estate by descent as part of the old *reversion*, that is, the residue of the estate which returned to the grantor and his heirs, after the determination of the particular estates created by him.

Sec. 4. *Where heirs take by purchase under limitations to the heirs of their ancestors, in deeds executed or wills taking effect after 31st December, 1833, the land shall descend, and the descent shall be traced as if such ancestor had been the purchaser of the land.*

Thus, under a limitation to the heirs male of the body of B., to whom no estate is given; the person who answers the description of heir male of the body of B., both by the old and the new law, takes by purchase an estate in tail male; but by force of this section, B. shall be treated as the first purchaser, although he never had any interest in the land.

Sec. 5. *Brothers and sisters shall trace descent through their parent, and shall no longer be considered to inherit immediately from each other.*

Sec. 6. *The nearest lineal ancestor shall be heir in preference to collateral relatives claiming through such ancestor.*

The old maxim was, that the inheritance might lineally descend, but not ascend; but now the father is preferred to the brother.

Sec. 7. *The male line is to be preferred.*

Sec. 8. *The mother of the more remote male ancestor is to be preferred to the mother of the less remote male ancestor.*

Sec. 9. *Half blood shall inherit, if on the part of a male ancestor, after the whole blood of the same degree, if on the part of a female ancestor, next after her.*

In cases not regulated by this Act, relations by the half blood are incapable of inheriting to one another; but daughters of the same parent, though by different marriages, inherit together as coparceners.

Sec. 10. *Title to land which has descended after the death of a person attainted, may be traced through such person notwithstanding his attainder.*

By the old law, persons attainted of treason or felony were incapable of inheriting lands or of transmitting them by descent; and the attainder worked corruption of blood, so as to obstruct the descent from any more remote ancestor. But this was qualified by the Stat. 54 Geo. III. c. 145, which enacted, that no attainder, after 27th July, 1814, except for treason, or murder, should prejudice any person but the offender himself during his life.

Sec. 11. *The Act shall not extend to any descent which took place before 1st January, 1834.*

See further on this important Statute, 2 Sug. Vend. 228 (10th ed.)

In order to ascertain the heir-at-law, the first inquiry is, whether the law of the inheritance is regulated by the late Statute; in other words, whether the person last entitled to the land has died since the 1st day of January, 1834. If so, the next inquiry should be, was the last proprietor the first purchaser; in that case, he is to be regarded as the root of the inheritance; but if the estate came to him by descent, then, as the heir must be of the blood of the first purchaser, that line of ancestors cannot inherit from whom

Heir-at-law,
how ascertain-
ed.

the land did not descend ; if, for instance, the last proprietor inherited as heir to his mother, the paternal line of ancestors is excluded from inheriting. But if the last proprietor left issue, it is immaterial whether such proprietor took the estate by descent or purchase, for the inheritance shall descend to his first son and his issue, and if his line be extinct, then to the second son and his issue, and so on to the other sons successively, and their respective issue ; and in default of these, the daughters or their issue take in the same manner as under the old law. If the last proprietor left no issue, then (assuming that he was the first purchaser), the inheritance ascends to his father and to his issue ; the brothers and sisters of the last proprietor taking in the same order with the proprietor's own issue, and in priority to the proprietor's half brothers and sisters.

For want of issue of the proprietor's father, the inheritance ascends to his (the proprietor's) paternal grandfather and his issue.

For want of such issue, then to the paternal grandfather's father and his issue.

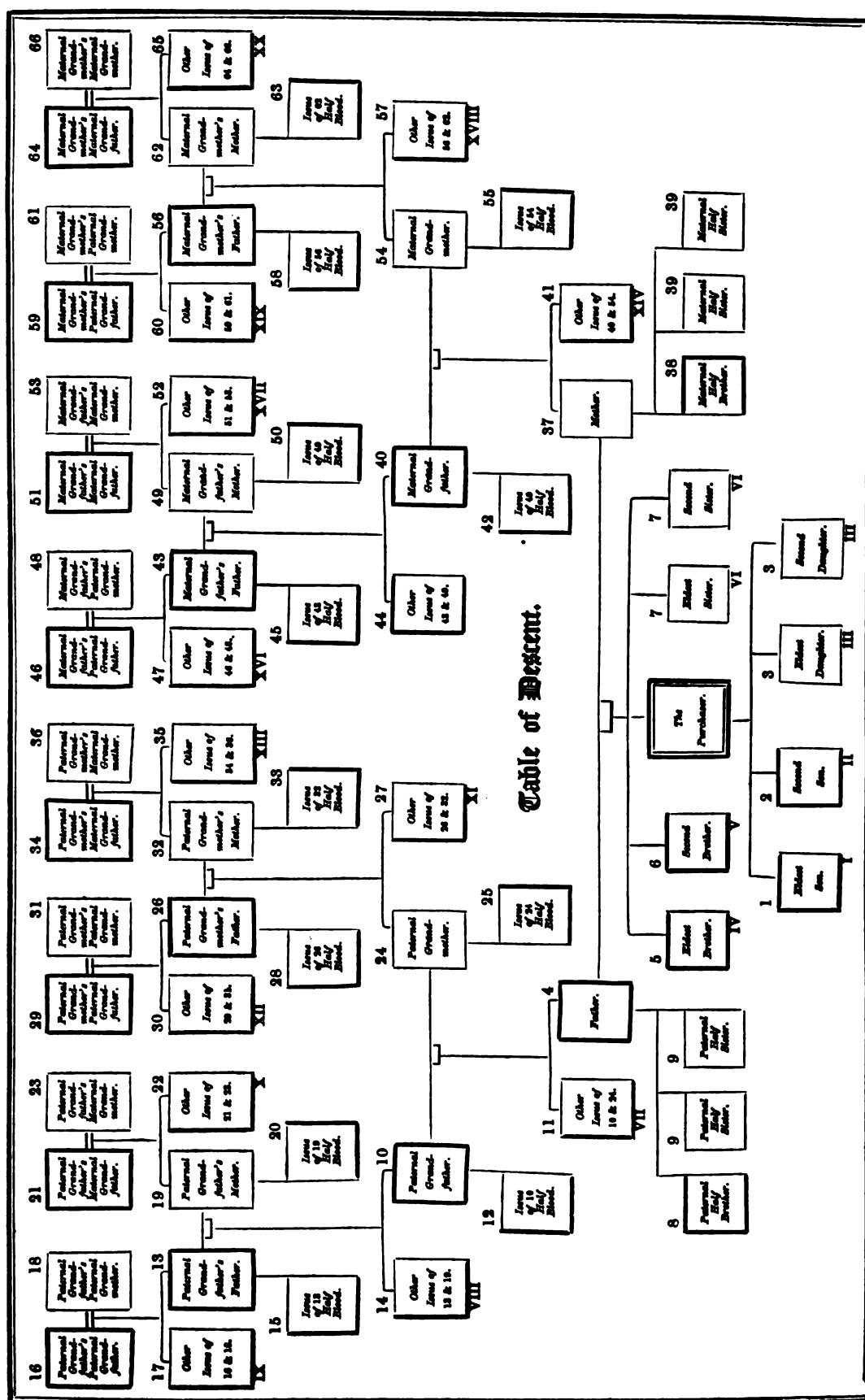
For want of such issue, then to the paternal grandfather's paternal grandfather and his issue, and so *in infinitum*.

If no paternal lineal male ancestors, or their descendants, are forthcoming, the rule given in the 8th section of the Act must be applied, viz., that the mother of the more remote male ancestor shall be preferred to the mother of the less remote male ancestor ; and if the paternal blood of the last proprietor entirely fail, and not before, recourse must then be had to the maternal line, in the same manner and order of succession as the paternal line.

Estates tail descend *per formam doni* ; this descent is governed by the Statute *De donis* (13 Ed. I. cap. 1), and not either by the common Law, or by the late Statute ; therefore the maxim *seizina facit stipitem* will not apply ; nor are the half blood excluded, 8 T. R. 211, although the person last seised died before the 1st day of January, 1834 ; and it would seem that the descent of an estate tail would not be interrupted by an attainer.

Table of descents.

In the annexed Table of Descent, the Arabic figures indicate the order of succession according to the new law, and the Roman numerals indicate the order according to the old law, supposing the person called in the Table the purchaser, to have been the person last seised. The Table shews also the order in which, under the new law, an estate inherited from the purchaser, by any one of the individuals included in the Table, would descend from that individual.





Secondly, as to the personal estate of an intestate, its destination is regulated by the Statute 7 Will. III. c. 6, Ir., called the Statute of Distributions, which incorporates the provisions of the English Acts 22 & 23 Car. II. c. 10; 29 Car. II. c. 3, s. 25; and 1 Jac. II. c. 17.

Intestate's personal estate.

Statute of Distributions.

The object of this Statute is to prevent the injustice to the next of kin, of the administrator being permitted to enjoy exclusively the residue of the personal estate after payment of debts and legacies.

The Act empowers the Ordinary to call the administrator to account, and to enforce distribution of the residue among the next of kin of the deceased, according to the rules therein set down.

The degrees of kindred under the Statute of Distributions are taken from the Civil Law; *Lloyd v. Tench*, 2 Ves. Sen. 213; see also *Withy v. Man- gles*, 4 Beav. 358.

Next of kin under the Statute.

The children of the intestate and his parents are related to him in the first degree.

The grandchildren of the intestate and his grandparents, and his brothers and sisters, are related to him in the second degree.

The great grandchildren of the intestate, and his uncles and aunts, and his nephews and nieces, are related to him in the third degree.

The great great grandchildren of the intestate, and his great uncles and his first cousins (uncle's children), are related to him in the fourth degree. But the lineal descendants of the intestate, *in infinitum*, are preferred to ascendants or collaterals; *Keylway v. Keylway*, 2 P. W. 344. And brothers and sisters are preferred to a grandfather; *Evelyn v. Evelyn*, Amb. 191; though as the brother can only be reached through the father, the grandfather and brother are both in the second degree.

The next of kin under the Statute of Distributions, are said to take *per capita* where the claimants take in their own right, and not as representatives of another; thus, where the next of kin are three brothers, A., B., and C., each takes one-third of the effects in his own right. They are said to take *per stirpes*, where the claimants take as representatives the share of their parent, or root. Thus, where the next of kin are two brothers, A. and B., and the children of a deceased brother, C., then A. and B. shall each take one-third of the effects, *per capita*, and the children of C. shall take their father's one-third equally among them *per stirpes*; *Lloyd v. Tench*, *sup.* (2 Ves. Sen. 213). But if the next of kin be all nephews and nieces, the intestate having survived his brothers and sisters, then the claimants all take *per capita*.

Per capita;

or *per stirpes*.

This doctrine, that lineal descendants represent the ancestor, is not admitted as to collateral relations more distantly related to the intestate than the children of his brothers or sisters.

Where a father has in his life-time advanced some of his children, by giving them a portion or settlement of land, annuity, commission in the army, &c., and then dies intestate, such children claiming a distributive share of the assets must bring the advancement into hotchpot, as it is called, *i. e.*, they shall only have the advancement made up equal to the shares of the other children; *Edwards v. Freeman*, 2 P. W. 435; and the heir has

Hotchpot.

no advantage over the other children as to advancement of personal estate ; but the heir shall not bring into hotchpot the lands which came to him, by descent or otherwise, from the intestate.

Sums paid for maintenance or education of any child are not to be brought into hotchpot.

Where there is a widow and children, the widow shall have only one-third of the effects, exclusive of advancements to children, for the widow takes no benefit from the hotchpot clause in the Statute of Distributions.

No preference shown to paternal relatives ; or to whole blood.

A child in *ventre sa mere* is considered in *esse*.

Paternal and maternal relatives in equal degree take equally ; *Blackborough v. Davis*, 1 P. W. 41. Relations of the half blood take equally with relations of the whole blood ; *Winchelsea v. Norcliffe*, 1 Vern. p. 437. Children in *ventre sa mere* at death of intestate take equally with those born at death of intestate ; and this applies not only to children of the intestate, but also to his brothers, &c. ; *Burnet v. Mann*, 1 Ves. Sen. 156 ; *Jessop v. Watson*, 1 Myl. & K. 665.

Having regard to the foregoing observations, the following table will shew the destination of the personal estate of an intestate, as regulated by the Statute of Distributions.

Table of next of kin under the Statute.

If Intestate die leaving

His next of Kin shall take in the Proportions following :

Widow and children, or the representatives, *i. e.*, lineal descendants of children ;

One-third to the wife ; rest to children or their representatives (*i. e.* their lineal descendants), equally ; *Price v. Strange*, 6 Mad. p. 161.

Children or their representatives ; *e. g.*,

All to them ; *Palmer v. Garrard*. Pr. Ch. 21.

Son, and daughter of deceased son ; Children by two wives ;

Half to each.
To all equally.

Widow, and no child, or representative of a child, *e. g.*,

The moiety to the widow, rest to next of kin in equal degree, or their legal representatives.

Widow, mother, brothers, and nieces ;

Half to widow, residue to the others equally.

Widow and brother ;

Half to each.

Neither widow, nor children, nor representatives of children ;

All to next of kin in equal degree.

Husband ;

All to him.

Father and brother ;

All to father.

Father and widow ;

One-half to each.

Mother and brother ;

Half to each.

Mother and widow ;

Half to each.

Mother, widow, and children of deceased brother ;

Half to widow ; one-fourth to mother ; and one-fourth to children of deceased brother ; *Stanley v. Stanley*, 1 Atk. 455.

Mother and no father, or wife, or child, or brother, sister, or representative of a child, brother, or sister ;	All to mother.
Mother-in-law ;	Takes nothing.
Mother, brother, and sisters, or the representatives of deceased brothers and sisters ;	Equally to all.
Brothers, sisters, and the children of a deceased sister ;	Equally to both ; the children of a deceased sister representing the parents.
Father's father, and mother's mother ;	Equally to both ; <i>Blackborough v. Davis</i> , 1 P. W. p. 53.
Brother and aunt ;	All to brother.
Brother and grandfather ;	All to brother ; <i>Evelyn v. Evelyn</i> , 3 Atk. 762.
Uncle's or aunt's children, and brother's or sister's grandchildren ;	Equally to all.
Paternal grandfather and maternal grandmother ;	Both equally ; <i>Blackborough v. Davis</i> , <i>sup.</i> (1 P. Wms. 41).
Grandmother, uncle, or aunt ;	All to grandmother ; <i>Lloyd v. Tench</i> , 2 Ves. Sr. 213 ; <i>Woodroffe v. Wickworth</i> , Pr. Ch. 527.
Grandmother and nephew ;	All to grandmother ; <i>Blackborough v. Davis</i> , <i>sup.</i>
Aunt, nephew, and niece ;	Equally to all ; <i>Lloyd v. Tench</i> , <i>sup.</i> (2 Ves. Sen. 213).
First cousin and great nephew ;	Equally to both.
Uncle, and deceased uncle's child ;	All to uncle.
Nephews and nieces ;	Equally <i>per capita</i> .
Uncle, and son of deceased uncle ;	All to uncle.

No distribution of an intestate's goods shall be made until the expiration of a year after his death ; but the state of the intestate's family at his death determines the question who are his next of kin, and the distributive shares vest in the next of kin immediately on the intestate's death, and shall go to the representatives of the parties entitled, if they die before the expiration of the year ; for the Statute of Distributions is in nature of a will made by the legislature for those who have died intestate ; 2 P. Wms. p. 442.

No distribution for one year ; but shares vest in next of kin at death of intestate.

In an administration suit, when inquiries are necessary to ascertain a class of persons beneficially interested, *e. g.* who are the next of kin of an intestate, it is irregular to direct the accounts to be taken until after the inquiries have been made, and the Master has made his report ; *Baker v. Harwood*, 1 Hare, 327 ; *Hawkins v. Hawkins*, 1 Hare, 543 ; *Kimberley v. Tew*, 5 Ir. Eq. R. 389.

Affinity or relationship by marriage, except in the case of the intestate's wife, gives no title to a share of his property under the Statute of Distributions.

Law of Domicile.

The distribution of the personal estate, when in the hands of an executor or administrator, is regulated, not, as is grant of probate or administration, according to the district where the property is situated, but according to the law of the country in which the intestate was domiciled at the time of his death, even though the property be in Scotland, or elsewhere.

A domicile is the place of permanent residence, not a mere transitory abode; hence, if a subject of another country die intestate in Ireland, his effects are distributed according to the law of his own country; *Bempde v. Johnstone*, 3 Ves. 198.

Executors' accounts; cannot after accepting renounce; liable for default;

Executors are in Equity considered as trustees, and accountable as such; they are at liberty to renounce the office, but if they once accept it, by proving the will, or by any other clear indication of an intention to act, they are bound to perform the trust; *Mucklow v. Fuller*, Jac. 198: and not only will an executor be held liable for a loss occasioned by his own act; *Williams v. Nixon*, 2 Beav. 472; but also for a loss occasioned by his negligence and default; *Rowley v. Adams*, 4 Myl. & Cr. 534. To exonerate an executor, it is not enough to shew that he was merely passive in the transaction, for if he stand by and acquiesce in a misapplication of assets by his co-executor, he shall answer for the loss; *Booth v. Booth*, 1 Beav. 125; provided he was aware of the misapplication, or at least had good reason to suspect it; *Williams v. Nixon*, *sup.* Inquiries will, if necessary, be directed as to whether the executor proved or accepted the trust, and when first he had notice of the breach of trust; *James v. Frearson*, 1 Y. & Col. C. C. 370.

or acquiescence in misapplication of assets;

Executors, as well as other accounting parties, are bound to be always ready with their accounts, and if they retain balances in their hands longer than is required for the fair and *bonâ fide* exigencies of the trust, and *a fortiori*, if they trade with the assets, and make profit of them, they shall be chargeable with interest; *Pearse v. Green*, 1 Jac. & W. p. 140; *Freeman v. Fairlie*, 3 Mer. p. 43; *Dawson v. Massey*, 1 Ball & B. p. 231; and if it appear that more than legal interest has been made, they must account for that further sum; *Pocock v. Redington*, 5 Ves. 794; *Piety v. Stace*, 4 Ves. p. 622; and see *Tebbs v. Carpenter*, 1 Mad. 290.

charged with interest on balances.**Rate of interest.**

The rate of interest with which an executor shall be charged, lies in the discretion of the Court; and that discretion is not taken away in Chancery by the 106th General Rule of the Court, issued on the 27th day of March, 1843; *Cuffe v. Cuffe*, 3 Ir. Eq. R. 469; and see 1 Jones & L. p. 28.

Account with rests.

In a gross case, the Court will direct an account, with yearly, or even half-yearly rests, and charge the executor with interest on the balances which shall appear to have been from time to time in his hands; *Raphael v. Boehm*, 11 Ves. 92; *Tebbs v. Carpenter*, *supra*.

Special case necessary to charge with wilful default.

The Court will not presume that an executor has misconducted himself, and therefore will not make him account as for wilful default, unless a special case is made against him. Inquiries with a view to charge executors with wilful default, have been directed at the original hearing, where there are sufficient admissions in the answer, or where a case is made by the bill, and proved, and that relief is specially sought for by the prayer; *Law v. Hunter*, 1 Russ. 100. But such inquiries are more frequently

granted on further directions, grounded upon facts stated in the report; and it seems such directions will be given if the Court should think fit, even though the case of wilful default was made by the bill, and not acted on by the decree at the first hearing; see *Cuffe v. Cuffe*, *sup.* (3 Ir. Eq. R. 469), over-ruling *Garland v. Littlewood*, 1 Beav. 527.

For form of bill seeking to charge an executor as for wilful default, see *post*.

In connexion with the subject of an executor's accounts, it is necessary to observe, that an executor, being considered as a trustee, is not entitled to any allowance for his time and trouble; for his acceptance of the office was optional with himself, and if permitted to be his own paymaster, his interest in remunerating himself would be opposed to his duty with respect to the fund he is to administer; *Robinson v. Pett*, 3 P. W. 249.

Executor not allowed for his time or trouble.

Upon this principle, a solicitor who is an executor can charge only his costs out of pocket; *New v. Jones*, 9 Jar. Byth. p. 732 (3rd ed.); *Moore v. Frowd*, 3 Myl. & Cr. 45; although he be in partnership with another; *Collins v. Carey*, 2 Beav. 128. But as the deed creating the trust may authorize the trustee, being a solicitor, to retain his costs, so the will, appointing a solicitor executor, may give him, in terms, the right to charge for his professional services; *In re Sherwood*, 3 Beav. 338. And although the rule in question is not confined to solicitors; *Sheriff v. Axe*, 4 Russ. 33; *Mosely*, 128; yet it has been held not to deprive a tradesman who is an executor, of the right to charge the ordinary market price, not of his time or trouble, but of goods he has furnished; *Smith v. Langford*, 2 Beav. 362.

Where an executor obtains a renewal or new lease of lands held by his testator, this is in Equity a continuation of the old interest, or what is termed a graft on the old lease, and will accordingly be declared to have been taken in trust for those beneficially interested in the assets: this principle, indeed, has been extended in its application to all persons clothed with a fiduciary character, as trustee, mortgagee, &c., and to persons having only a particular estate, as tenant for life, &c.; see *Buckley v. Lanauze*, Ll. & G. *temp.* Plunket, 327, and the cases collected, Ll. & G. *temp.* Plunket, 353, n.; *Tanner v. Elworthy*, 4 Beav. 487; *Jones v. Kearny*, 1 Dru. & War. 134, S. C. 4 Ir. Eq. R. 74. But a lease obtained by an under tenant from the head landlord will not be declared a trust for the immediate landlord; *Maunsell v. O'Brien*, 1 Jones, 176; S. C. 3 L. R. N. S. 196; nor, it seems, a purchase of the reversion in fee by a tenant for life of the leasehold interest; *Randall v. Russell*, 3 Mer. 190, and see *ib.* 347.

Doctrine of graft.

In the case of *Jackson v. Welsh*, Ll. & G. *temp.* Plunket, 346, Lord Plunket, C., held, that the question of graft might be raised for the first time in the Master's Office, but the safer course will be to put the facts in issue in the bill, and obtain the decision of the Court at the first hearing of the cause.

A creditor who has *debitum in presenti solvendum in futuro* may maintain a suit for administration of assets; *Whitmore v. Oxborrow*, 2 Y. & Col. C. C. 13.

Suit to administer by whom maintainable.

A mortgagee may also maintain such suit on behalf of himself and all other the creditors of the deceased mortgagor; *Skey v. Bennett*, 2 Y. &

Col. C. C. 405; *Greenwood v. Firth*, 2 Hare, 241, *n.*; *sed vide Burney v. Morgan*, 1 S. & Stu. 458; Story's Eq. Pl. 86.

The cases in which a bill may be filed by one creditor on behalf of himself and others, are those in which all have a common interest, and not where the several demands are distinct; *Jones v. Garcia Del Rio*, T. & Russ. 297.

It seems that if a creditor's bill be properly framed in other respects, the omission of the usual introductory statement of its being filed on behalf of plaintiff and other creditors, &c., is immaterial; *O'Kelly v. Bodkin*, 2 Ir. Eq. R. 361; but see *May v. Selby*, 1 Y. & Col. C. C. 235; *Johnson v. Compton*, 4 Sim. 47.

Costs of suit to administer.

With respect to the plaintiff's costs in a suit to administer assets, if the plaintiff be an executor seeking to administer the assets, or a trustee seeking to have the trusts carried into execution, the general rule is, that the plaintiff will be entitled to his costs as between solicitor and client, and those costs will be paid in priority to the demands of any of the *cestui que trusts*; *Bennet v. Going*, 1 Mol. 529. If the plaintiff be a creditor, or incumbrancer, the rule of the Court of Chancery, in Ireland, is, that he is entitled to his costs in the cause only in the same priority as his demand; *Nelson v. Brady*, 2 Dru. & War. 143; S. C. 4 Ir. Eq. R. 359; *Cooke v. Campbell*, 4 Ir. Eq. R. 433; and see cases *ante*, p. 59. But where the suit is properly and necessarily instituted by a simple contract creditor, for the administration of *personal* assets, the plaintiff shall have his costs though the fund prove deficient; *Barber v. Wardle*, 2 Myl. & K. 818; on the other hand, if he institute and prosecute the suit after having been correctly informed that the assets were deficient, he will have to pay the costs of such suit; *King v. Bryant*, 4 Beav. 460.

A creditor may entitle himself to his costs in priority to the claims of creditors by judgment or specialty, but for this purpose he will have to shew that a suit was necessary for the due administration of the assets; *Jameson v. Farrer*, 3 Ir. Eq. R. p. 354; or else he must shew that by his exertions he has realized a fund which might otherwise have been lost, and thus establish his claim to salvage costs; *Drake v. Forde*, 3 Ir. Eq. R. 56; *Nelson v. Brady*, *supra* (2 Dru. & War. 143; S. C. 4 Ir. Eq. R. 359). If the fund prove deficient, plaintiff will have to pay the costs of prior incumbrancers parties to the suit, but they cannot resort to the plaintiff until the deficiency of the fund is shewn; *Hall v. Hill*, 3 Dru. & War. 59; S. C. 5 Ir. Eq. R. 11.

Where the costs of a suit to administer assets have been increased by any shares of the property having been assigned, that addition to the costs will be thrown on the shares so assigned or incumbered; *Parker v. Marchant*, 1 Y. & Col. C. C. p. 311.

Contribution to costs in creditor's suit.

In the Court of Exchequer, if a suit be instituted, of which the general creditors may take advantage, they come in under the decree, upon the terms of being bound to contribute to the plaintiff's costs; they are considered as co-plaintiffs, and bound, therefore, to share with the plaintiff, in proportion to their several demands, the burden of satisfying the costs

which the plaintiff is liable to pay to his solicitor, upon the principle, "*qui sentit commodum sentire debet et onus*;" Tallon v. Tallon, 6 Law Rec. N. S. 290. This principle is also adopted and acted on in the Courts of Equity in England; Tootal v. Spicer, 4 Sim. 510; Brodie v. Bolton, 3 Myl. & K. 168, and see Stanton v. Hatfield, 1 Keen. 358.

If the fund be insufficient to pay the creditors, the inheritor not being interested, the Plaintiff's costs will be paid in the first instance, as between solicitor and client, out of the fund; Lynch v. Skerrett, 3 Ir. Eq. R. 504. But if there be a surplus, the owner of the estate is entitled thereto, and is liable to pay costs between party and party only, and therefore in such case the *extra* costs must be paid by the creditors, in proportion to their demands; Bracken v. Drought, 2 Jones 114; Bagge v. —, 3 Ir. Eq. R. 494.

If a creditor be stayed in his own suit, and obliged to prove under the decree, he will not be made to contribute to the plaintiff's costs; O'Brien v. Fitzgerald, 3 Ir. Eq. R. 159; nor, it would seem, where the creditor was compelled to come in by the threat to charge him with the costs of a supplemental bill; Cooke v. Campbell, 4 Ir. Eq. R. 431; nor will creditors be bound to contribute where the plaintiff is not a creditor but a legatee; Pidgeon v. Dalton, Exch., Mich., 1839; Lynch v. Skerrett, *sup.* (3 Ir. Eq. R. 504).

Where the testator creates the difficulty which occasioned the suit, the costs must come out of the estate; Russell v. Dickson, 4 Ir. Eq. R. 339.

Where the heir at law has suppressed, concealed, or destroyed a will, the parties entitled thereunder may file their bill against the heir, praying that they may be decreed entitled to hold and enjoy the lands devised to them, and that the heir may convey to them. In such a suit the material questions are: 1. The existence of the will; 2. Its contents; 3. Its suppression; see Hampden v. Hampden, 1 P. W. 733; S. C. 1 Bro. P. C. 250.

In cases of suppression and spoliation, the Court of Equity has a peculiar jurisdiction. It will try a question which could only be the subject of an ejectment if the suppression or spoliation of the instrument had not rendered the remedy by ejectment inapplicable by precluding the possibility of proof of the instrument; and the Court in exercising this jurisdiction has carried so far the principle "*In odium spoliatorum documentorum omnia præsumuntur*," that if spoliation be proved, it will be assumed that the contents of the instrument spoliated are what the plaintiff alleges; Barber v. Ray, 2 Russ. p. 723.

jurisdiction is changed from Law to Equity.

Every thing presumed against the party suppressing.

But a bill of this description would be demurrable unless an affidavit of the plaintiff were annexed to it, that the instrument in question is not in his custody or power, and that he knows not where it is, unless it be in the hands of the defendant; for every bill which seeks discovery of a lost instrument, and prays relief which might be had at law if the instrument were in the hands of the plaintiff, must be accompanied by such an affidavit; Mitf. Pl. (4th ed.) 54, 124; Smith v. Spencer, 1 Y. & Col. C. C. 75.

Affidavit required to support bill.

BILLS FOR ADMINISTRATION OF ASSETS.

Bill by next of Kin of an Intestate to recover distributive Share of the Residue of personal Assets.

To the, &c.

In Chancery.

Intestate possessed of personal estate,

HUMBLY complaining, sheweth unto your Lordship, your suppliant, John Warren, of, &c., that John Brown, late of, &c., deceased, your suppliant's maternal uncle, was in his life-time, and at the time of his death, possessed of, interested in, and entitled unto a very considerable personal estate, consisting of divers premises held upon lease for terms of years, and other chattels real, monies, bills, bonds, promissory notes, mortgages, judgments, and other securities for money, sums invested in the Government funds, debts due to him, ready money, household furniture, and various other particulars, to a large amount in value in the whole, and much more than sufficient to have paid and satisfied all his just debts, and funeral and testamentary expenses.

more than sufficient to pay his debts, &c.

Died intestate.

And your suppliant further sheweth, that the said John Brown being so possessed, interested, and entitled, departed this life some time in or about the year 1840, intestate, unmarried, and without issue, leaving your suppliant, and your suppliant's brothers, James

His next of kin.

Warren and Richard Warren, his nephews, and sole next of kin, him surviving.

Administration to defendant,

Your suppliant further sheweth, that the said Richard Warren, upon the death of the said intestate, procured letters of administration of his personal estate and effects to be granted to him by the proper Ecclesiastical Court; and the said Richard Warren thereby

became, and is the legal personal representative of the said intestate.

And your suppliant further sheweth, that by virtue of such letters of administration, the said Richard Warren hath possessed himself of all the personal estate and effects of the said intestate, consisting of the various particulars aforesaid, to an amount much more than sufficient to pay and satisfy the said intestate's debts, and funeral and testamentary expenses.

who has possessed himself of the personal estate.

Your suppliant further sheweth, that the residue of the said intestate's personal estate and effects, after payment of his debts, and funeral and testamentary expenses, is distributable in equal shares and proportions between your suppliant, and the said James Warren and Richard Warren, according to the Statute for the distribution of the personal estate of intestates; and that your suppliant, as one of the next of kin of the said intestate, is entitled to one equal third part or share of such residue of the said intestate's personal estate and effects.

Plaintiff is entitled to share of residue.

Your suppliant further sheweth, that your suppliant has never received any sum whatever on account of his said distributive share of the assets of said intestate.

Plaintiff has received nothing.

And your suppliant has frequently applied unto the said Richard Warren, and requested him to come to an account with your suppliant in respect of his said distributive share of the assets of the said intestate; and your suppliant hoped that his requests would have been complied with.

Applications.

But now so it is, that the said Richard Warren, combining with the said James Warren, who refuses to join your suppliant in this suit, and with, &c., *ante*, p. 17.

Combination.

And the said Richard Warren at times pretends, that the personal estate and effects of the said intestate were small and inconsiderable, and have been exhausted in the payment of his debts, funeral and testamentary expenses, whereas your suppliant charges the contrary thereof to be the truth, and that there is in the hands of the said Richard Warren a considerable surplus of said estate and effects, and so it would appear, if the said Richard Warren would set forth a full and particular account of the said personal estate and effects, but which he refuses to do.

Charging part.

All which, &c., see *ante*, p. 18. To the end, therefore, that the

General averment.

Interrogating
part.

said defendants may, if they can, shew why your suppliant should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say :

1. Whether the said John Brown was not in his life-time, and at the time of his death, possessed of, interested in, and entitled unto a considerable personal estate, consisting of the various particulars hereinbefore mentioned, and whether such personal estate was not to a large, and what amount, and whether the same was not much more than sufficient to have paid and satisfied all his just debts, and funeral and testamentary expenses—or how otherwise ?

2. Whether the said John Brown did not depart this life about the time hereinbefore mentioned, intestate, unmarried, and without issue, and whether he did not leave your suppliant and the said defendants, your suppliant's brothers, his nephews, and sole next of kin, him surviving—or how otherwise ?

3. Whether the said defendant, Richard, did not, upon the death of the said intestate, procure letters of administration of his personal estate and effects, to be granted to him by the proper, or some and what Ecclesiastical Court, and did not thereby become, and is not now the legal personal representative of the said intestate, or how otherwise ?

4. Whether by virtue of such letters of administration, the said defendant, Richard, hath not possessed himself of all, or of some, and what part of the personal estate and effects of the said intestate, to some and what amount, and whether to an amount more than sufficient to pay and satisfy the said intestate's debts, and funeral and testamentary expenses, or how otherwise ?

5. Whether the residue of the said intestate's personal estate and effects, after payment of his debts, and funeral and testamentary expenses, is not distributable in equal, or in some and what shares and proportions between your suppliant and the said defendants, according to the Statute for the distribution of the personal estate of intestates, and whether your suppliant, as one of the next of kin

of the said intestate, is not entitled to one equal third part or share, or to some other and what part of such residue ?

6. Has your suppliant ever received any sum on account of his said distributive share of the assets of the said intestate ; if so, what was the amount of such sum, and when, and from whom did he receive same ?

7. Has not your suppliant made such requests to the said defendant, Richard Warren, as hereinbefore mentioned, and hath he not refused to comply therewith, and why hath he so refused ?

And that the said defendants may answer the premises ; and that an account may be taken, under the directions of this honourable Court, of the personal estate and effects of the said John Brown, deceased, into whose hands the same came, and how disposed of ; and also an account of his debts, and funeral and testamentary expenses, and that such personal estate and effects may be applied in a due course of administration ; and that the clear residue thereof may be ascertained, and that the rights of your suppliant, and of the other next of kin of the said intestate, in respect to such residue, may also be ascertained ; and that it may be declared that your suppliant, as one of the next of kin of said intestate, is entitled to one equal third part or share of the residue of the personal estate and effects of the said intestate ; and that the same may be paid to your suppliant ; and that your suppliant may have such further and other relief in the premises, as to your Lordship shall seem meet, and the circumstances of the case may require.

Prayer.

Account of personal estate of intestate ;

of his debts and legacies ;

that the residue may be ascertained ;

that plaintiff may be declared entitled to one-third of such residue ; and may be paid the same.

General relief.

May it please, and soforth.

[*Pray subpœna against defendants, Richard Warren and James Warren*].

The defendant, Richard Warren, is required to answer the interrogatories, numbered 1, 2, 3, 4, 5, 6, and 7.

The defendant, James Warren, is required to answer the interrogatories, numbered 1, 2, 5, and 6.

Bill by the infant Daughters of an Intestate, against his Widow, their Mother, for Account, &c.

To the Right Honourable and Honourable the Chancellor, Treasurer, the Lord Chief Baron, and the rest of the Barons of her Majesty's Court of Exchequer in Ireland.

In the Exchequer.

Humbly complaining, shew unto your Lordships your suppliants Mary Roe and Emma Roe, of, &c., spinsters, daughters and co-heirs of William Roe, late of, &c., aforesaid, Esquire, deceased, debtors and accountants to Her Majesty, your suppliants being infants under the age of twenty-one years, that is to say, your suppliant Mary being of the age of seventeen years or thereabouts, and your suppliant Emma being of the age of sixteen years or thereabouts, by John Doe, of, &c., their next friend.

William Roe
seised of real

1. That the said William Roe, your suppliants' late father, was, in his life-time, and at the time of his death, seised in fee or of some other good estate of inheritance of and in divers messuages, tenements, and lands, with the appurtenances, situate, &c., of the yearly value in the whole of £1000 and upwards, or other considerable yearly value.

and personal
estate,

2. And was also, at the several times aforesaid, possessed of, interested in, or entitled unto, very considerable personal estate, consisting of, &c., amounting in the whole to the value of £5000, or other considerable value.

died intestate,
leaving widow,
and leaving
plaintiffs his co-
heirresses;

3. And being so seised and possessed, the said William Roe departed this life intestate, on or about the 1st day of May, 1842, leaving Jane Roe, his widow and your suppliants' mother, and your suppliants his only daughters and co-heirresses, him surviving.

to whom real
estates of their
father descend-
ed.

4. And your suppliants further shew unto your Lordships, that on the death of your suppliants' said late father, the said messuages, lands, tenements, and premises whereof he died seised as aforesaid, descended and came to your suppliants as his daughters and co-heirresses, subject only to the right of dower or jointure of the said Jane Roe, your suppliants' said mother, in the same, during her life.

Personal estate
distributable
amongst widow

5. And by virtue of the Statute for the distribution of intestates' estates, the clear personal estate of the said intestate, after payment

of debts and funeral expenses, ought to be distributed into three equal parts or shares, whereof the said Jane Roe is entitled to one-third, and the other two-third parts of the said personal estate ought to be equally divided between your suppliants, being the only children of their said father. and plaintiffs equally.

6. Your suppliants further shew, that on their said father's death the said Jane Roe, as guardian to your suppliants, or otherwise in their right, or on their behalf, entered and possessed herself of all and singular the said real estate of your suppliants' said late father, and hath ever since his death received and taken the rents, issues, and profits thereof. Widow in possession of real estate of intestate;

7. And the said Jane Roe also obtained letters of administration to be granted to her forth of the Court of Prerogative in Ireland, of the said intestate's personal estate, and by virtue of said letters possessed herself of the said intestate's goods, chattels, and personal estate, of such value as aforesaid, and hath sold and disposed of the same, and raised large sums of money thereby, to two-third parts or shares whereof your suppliants are entitled as aforesaid. and as administratrix also in possession of personalty.

8. And your suppliants hoped the said Jane Roe would have come to a fair and just account with your suppliants touching the same, and would have paid to your suppliants what should appear justly due to them in respect of the premises, and that the money so due and belonging to your suppliants, as aforesaid, should have been from time to time put out and improved for the benefit and advantage of your suppliants, as the same ought in justice and equity to be.

9. And the said Jane Roe hath also possessed herself of all the deeds and writings concerning the said estate of the said William Roe.

But now so it is, may it please your Lordships, that the said Jane Roe combining and confederating with divers other persons at present unknown to your suppliants, whose names, when discovered, your suppliants pray they may be at liberty to insert herein, with apt words to charge them as parties defendants hereto, and contriving how to wrong and injure your suppliants in the premises, absolutely refuses to come to any account with your suppliants touching the rents, issues, and profits of their said father's real estate, or the particulars or value of his personal estate, or how she, the said Jane Roe, hath administered or disposed of the same, and hath not as Combination.

yet exhibited any inventory thereof in the proper Ecclesiastical Court, as she ought to have done.

Pretences.

And the said Jane Roe sometimes pretends, that your suppliants being infants, she need not account with them during their minorities, and that the father of your suppliants was at his death indebted to divers persons on mortgages, judgments, and other real securities, and that she hath paid considerable sums of money in or towards the discharge or satisfaction thereof, and that she is entitled to dower out of the real estate of your suppliants' said father, or otherwise to a jointure on the same or some part thereof; yet she refuses to discover the same.

And the said Jane Roe at other times pretends that the personal estate of your suppliants' said father was inconsiderable, and that he was at his death indebted on bond securities, book debts, debts by simple contract and otherwise, to several persons, in considerable sums of money, in or towards satisfaction of which she hath applied the same, and that if any surplus remained in her hands due to your suppliants in respect of said real and personal estate of your suppliants' said father, that she cannot take upon her to put out such monies, or any part thereof, at interest, or otherwise improve the same, without the direction and decree of this honourable Court for so doing.

General aver-
ment.
Interrogating
part.

All which, &c. (see *ante*, p. 18).

To the end, therefore, that the said Jane Roe may, if she can, shew why your suppliants should not have the relief hereby prayed, and may, upon her corporal oath, to the best and utmost of her knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several paragraphs and interrogatories herein contained, as are pointed out by their respective numbers in the note hereunder written, to be answered by each defendant respectively, that is to say :

10. What were the messuages, lands, and tenements of which the said William Roe was seised or possessed at the time of his death, and where do the same respectively lie, and what is the true rental or other yearly value thereof?

11. What is the amount of rents, issues, and profits of the said messuages, lands, and tenements, received by the said Jane Roe since the death of the said William Roe, or by any person or per-

sons by her order, or with her privity or knowledge, or for her use, and when and of whom did she receive the same, and what sum and sums of money hath she really and *bonâ fide* paid, disbursed, or allowed out of or in respect of the said William Roe's estate, or any and what parts thereof, and when and at what times, to whom, and for what, and on what account, hath she paid and allowed the same.

12. What estate, right, title, or interest, does the said Jane Roe claim in or to the said William Roe's estate, or any and what parts thereof, either for or on account of her dower, jointure, or otherwise; and by what deed, settlement, or conveyance, doth she claim or possess any jointure or other provision, if any such there be, out of the said estate and premises, and when, and upon what consideration, really and *bonâ fide*, was such settlement or conveyance made?

13. Hath the said Jane Roe in her custody, possession, or power, any deeds, evidences, or writings, concerning the said estate and premises; if so, let her discover and produce the same, and let her set forth what personal estate the said William Roe died possessed of, interested in, or entitled unto, and let her set forth a true and perfect inventory or account thereof, and the fair and true value of the same, and what part thereof hath come to her possession or power, or to the possession or power of any person or persons in trust for her, and how hath she administered and disposed of the same, and what parts thereof hath she sold, and to whom, and for how much, and was or were the price or prices thereof the full value or values thereof respectively, and what sum or sums of money hath the said Jane Roe at any time or times had or received, or raised thereby, and how hath she paid and applied the same, or any and what parts thereof, and when, to whom, and for what, and whether *bonâ fide* for debts due by the said William Roe, or otherwise?

14. Is there any part of the personal estate of the said William Roe still outstanding and undisposed of; if so, what are the particulars and what is the value thereof?

And that an account may be taken by and under the direction and decree of this honourable Court, of the personal estate and effects of the said William Roe, and of his real estates, and of the rents and profits of such real estates which accrued due since his

Prayer.

Account of
intestate's per-
sonal and real
estate.

decease, into whose hands the same respectively have come, and how applied and disposed of ;

Account of
debts, &c., and
of incumbrances
on real estate.

And also an account of the debts, and funeral and testamentary expenses of the said William Roe, and of all charges and incumbrances affecting the said real estate ;

Administration
of personal
estate, and
rights of
plaintiffs as-
certained ;

And that the personal estate of the said William Roe may be applied in a due course of administration, and that the clear residue thereof may be ascertained, and that the rights of your suppliants, as the next of kin of the said intestate, may be also ascertained ; and that it may be declared that your suppliants, as the co-heiresses at law of the said William Roe, are entitled to the real estate of which he died seised, and, as his next of kin, are also entitled each to one equal third part or share of the residue of his personal estate and effects ; and that the same may be applied or disposed of for the benefit of your suppliants, by putting out the same at interest, or otherwise improving the same as this honourable Court shall direct ;

and portions
invested.

Receiver.

And that a receiver may be appointed to receive the rents and profits of the said real and freehold estates, during the minority of your suppliants ;

And that all proper directions may be given for effectuating the purposes aforesaid, and that your suppliants may have such further and other relief in the premises as to your Lordships shall seem meet, and the circumstances of this case may require.

May it please, &c.

The defendant, Jane Roe [*intestate's administratrix*], is required to answer the several paragraphs, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, and to answer the several interrogatories, numbered 10, 11, 12, 13, and 14.

See observations, *ante*, p. 307.

Bill by simple Contract Creditor against the Executors of the deceased Debtor, for Payment of his Debts out of the personal Property of the Deceased.

To the, &c.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant, John Jones, of, &c., a creditor, by simple contract, of John Brown, late of, &c., deceased, on behalf of himself and all other the creditors of the said John Brown, who shall come in and seek relief by and contribute to the expense of this suit.

That the said John Brown, at the time of his death, was justly and truly indebted unto your suppliant in the sum of £50, and upwards, for goods sold and delivered, and monies paid, laid out, and expended to and for his use.

Testator indebted to plaintiff by simple contract.

Yoursuppliant(a) further sheweth unto your Lordship, that the said John Brown, in his life-time, and at the time of his death, was not seised of or entitled unto any real estate, but was possessed of a considerable personal estate, and being so possessed, the said John Brown departed this life on or about the 1st day of June, 1840, having first duly made and published his last will and testament in writing, bearing date on or about the 1st day of May, 1839, executed and attested as by law required, and thereby appointed John Thompson and James Thompson (the defendants hereinafter named) the executors thereof;

Testator possessed of personalty,

died, having by will

appointed defendants executors.

As in and by the said will, or the probate copy thereof, to which your suppliant craves leave to refer, when produced to this honourable Court, will appear.

Your suppliant further sheweth unto your Lordship, that the said John Thompson and James Thompson duly proved the said will in the proper Ecclesiastical Court, and took upon themselves the execution of the trusts thereof, and possessed themselves of the personal estate and effects of the said testator to a very considerable amount, and more than sufficient to satisfy his just debts, and funeral and testamentary expenses.

Probate.

(a) *Quære*, can a simple contract creditor sue the executor of his debtor, when the debtor died seised of real estate, without making the heir a party? See Calvert on Parties, 152.

Applications. Your suppliant further sheweth unto your Lordship, that the said John Thompson and James Thompson, having possessed themselves of the said testator's personal estate and effects, as aforesaid, your suppliant hath made frequent applications to them the said John Thompson and James Thompson, and requested them to pay and satisfy unto your suppliant his said demand.

And your suppliant hoped that the said John Thompson and James Thompson would have complied with such requests, as in justice and equity they ought to have done;

Combination. But now so it is, &c. (*ante*, p. 17).

Pretences. And the said defendants at times pretend, that the said testator's
 Personalty deficient. personal estate was small and inconsiderable, and hath already been exhausted in the payment of his funeral and testamentary expenses, and just debts.

Whereas your suppliant charges that the said testator's personal estate and effects were more than sufficient to discharge all his just debts, and funeral and testamentary expenses, and so it would appear if the said defendants would set forth a full, true, and particular account of all and every the personal estate and effects of the said testator come to their or either of their hands, or use, and also a full, true, and particular account of the manner in which they have disposed of or applied the same, but which they refuse to do.

General averment. All which actings, &c. (*ante* p. 18).

To the end therefore, &c. (*ante*, p. 309).

Prayer. [*Interrogate fully to the stating and charging parts.*]

Account of sum due to plaintiff, and of debts; And that an account may be taken of the monies due to your suppliant in respect of his said demand, and of other the debts owing by the said John Brown at the time of his death;

and, if necessary, an account of personalty received by defendants, And that if the said defendants shall not admit assets of the said testator, then that an account may also be taken of the personal estate and effects of the said testator, and of his funeral and testamentary expenses, and that such personal estate may be applied in a due course of administration;

and that same may be applied in payment. And that your suppliant, and the other unsatisfied creditors the said testator, may have such further and other relief in the premises, as to your Lordship shall seem meet, and the circumstances of this case may require. May it please, &c.

Bill by a simple Contract Creditor on behalf of Himself and the other Creditors of an Intestate, for Administration of his real and personal Assets.

To the, &c.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant, John Warren, of, &c., on behalf of himself and all other the creditors of John Brown, late of, &c., deceased, who shall come in and contribute to the expense of this suit.

That the said John Brown was, in his life-time, and at the time of his death, seised of a considerable real estate, and possessed of a very considerable personal estate and fortune, consisting of divers premises held upon lease for terms of years, and other chattels real, monies, bills, bonds, notes, mortgages, judgments, and other securities for money, and various other particulars, to a large amount in value in the whole, and much more than sufficient to pay all his just debts and funeral expenses.

Your suppliant further sheweth, that the said John Brown was in his life-time, and at the time of his death, indebted to your suppliant in the sum of £200 and upwards, for goods sold and delivered to and for his, the said John Brown's, use, and by his order; and in the sum of £300 on foot of a certain bill of exchange, bearing date the 1st day of May, 1838, for the sum of £300, payable three months after date to your suppliant, or his order, drawn by one John Stiles, and accepted by the said John Brown.

Your suppliant further sheweth, that the said John Brown, being so seised and possessed as aforesaid, departed this life on or about the 1st day of May, 1840, intestate, unmarried, and without issue, leaving his brother, James Brown, a defendant hereinafter named, his heir at law him surviving; and your suppliant sheweth that the said James Brown, since the death of the said John Brown, hath procured letters of administration of his personal estate and effects to be granted to him by the proper Ecclesiastical Court; and the said James Brown thereby became and now is the legal personal representative of the said John Brown, and has possessed himself

Intestate seised
and possessed
at his death.

Intestate in-
debted to plain-
tiff.

His death.

Defendant, his
representative,

in possession of
his personal

of the personal estate and effects of the said John Brown, consisting of the various particulars aforesaid, to an amount much more than sufficient for payment of the debts and funeral and testamentary expenses of the said John Brown; and the said James Brown, as heir at law of his said deceased brother, hath also taken possession of and entered into receipt of the rents and profits of all and singular the real and freehold property of the said John Brown, and ever since the death of his said brother hath continued and still is in possession or receipt thereof, and in particular the said James Brown, as such heir at law as aforesaid, is now in possession of the lands of *Granard*, situate in the County of Longford.

Plaintiff's demand still due.

Your suppliant further sheweth, that the whole of the said sums of £200 and £300, with interest on the said sum of £300, still remains justly due and owing to your suppliant from the said intestate's estate, and your suppliant has made, and caused to be made, several applications to the said James Brown, and requested him to pay and satisfy unto your suppliant the amount of your suppliant's said respective demands, with which just and reasonable requests your suppliant hoped that the said James Brown would have complied, as in justice and equity he ought to have done.

Combination.

But now so it is, &c. (*ante*, p. 17).

Pretences.

1. Intestate not indebted to plaintiff.

And the said defendant sometimes pretends that the said John Brown was not, at the time of his death, indebted to your suppliant in any sum of money whatever; whereas your suppliant charges the contrary, and that your suppliant's said demands are now justly due and owing to your suppliant, and so the said defendant will at other times admit, but then he pretends that the personal estate of the said intestate was insufficient for payment of his debts, and that he applied the same in or towards payment of the judgment and specialty creditors of the said intestate, but what specialty debts in particular he pretends to have paid thereout he refuses to discover, whereas your suppliant charges the contrary of such pretences to be the truth; and your suppliant is advised, and humbly insists, that if the personal estate and effects of the said intestate have been exhausted, then that your suppliant, and the other simple contract creditors of the said intestate, are entitled to resort to the real estates of the said intestate, and that such real estates are assets to be administered

2. No assets to pay plaintiff.

in Equity for the payment of the just debts of the said intestate, pursuant to the Statute^(a) in that case made and provided. But the said defendant, upon such or the like pretences as aforesaid, refuses to pay your suppliant his said demands, or to come to an account for the real or personal assets of the said intestate.

And the said James Brown hath got possession of the title-deeds and muniments of title relating to the real estate of the said intestate, which he refuses to produce or discover. Defendant has the title-deeds, &c.

All which actings, &c. (*ante*, p. 18).

To the end therefore, &c. (*ante*, p. 309).

[*Interrogate to the stating part, and insert interrogatories, pp. 25, 26, and 27, as to lands, &c., of which intestate died seised*].

And that the said defendant may set forth an account of the rents and profits of the said intestate's real estates and of chattels real, which accrued due since his death, received by the said defendant, or by his order, or for his use; and that an account may be decreed to be taken of the monies due to your suppliant in respect of his said several demands; and that an account may also be taken of the said intestate's personal estate and effects, and of the rents and profits of his real estates which accrued due since his decease, into whose hands the same respectively have come, and how applied and disposed of; and also an account of the debts, funeral and testamentary expenses of the said intestate, and of his real and freehold estates, and of all charges and incumbrances affecting the same; and that your suppliant and all other the creditors of the said intestate may be paid the sums which shall appear due to them, together with their costs of suit; and that the personal estate of the said intestate may be applied in a due course of administration, and, if necessary, that the real and freehold estates of the said intestate may be decreed to be sold, and that all proper parties may be decreed to join in such sale, and that in the meantime a Receiver may be appointed to receive the rents and profits of the said real and freehold estates, and that all proper and necessary directions may be given for effectuating the several purposes aforesaid, and for the payment of your suppliant's demands. [*And for further relief*]. May it please, &c.

Prayer.

Account of sums due plaintiff;

of intestate's personal estate; and of the rents of his real estate; and of his debts, &c., and of his real estates and incumbrances thereon.

Payment.

Sale.

Receiver.

(a) 3 & 4 Will. IV. c. 104.

Bill by Assignee of a Judgment for Administration of the real and personal Estate of a deceased Conusor.

To the Right Honourable Sir Edward Burtenshaw Sugden, Lord High Chancellor of Ireland.

In Chancery.

Richard
Malone,

executed his
bond to plain-
tiff's mother
in £4000 pe-
nalty.

Judgment en-
tered in C. P.

Hilary Term,
1819.

Judgment
assigned to
plaintiff,

on record.

Judgment
revived and

Humbly complaining, sheweth unto your Lordship, your suppliant, Lydia Carr, of, &c., spinster, on behalf of herself and all other the creditors of Richard Malone, late of, &c., deceased, who shall in due time come in and contribute to the expense of this suit; that the said Richard Malone being indebted to Lydia Carr, widow, the mother of your suppliant, in the sum of £2000, of the late Irish currency, he, for securing the repayment thereof, with lawful interest for the same, duly executed a certain bond or obligation in writing, bearing date the 27th day of September, 1817, with warrant of attorney for confessing judgment thereon, in the penal sum of £4000, of the said late currency, with a condition to the said bond annexed, making void the same upon payment of the said sum of £2000 late currency, together with interest, at the rate of *£6 per cent. per annum*, on a day therein mentioned, upon which bond, by virtue of the said warrant, the said Lydia Carr, on the 25th day of March, 1819, obtained judgment in Her Majesty's Court of Common Pleas in Ireland, against the said Richard Malone, as of Hilary Term, 1819, for the said penal sum, besides costs, as by the records of the said Court will appear.

Your suppliant further sheweth, that by indenture bearing date on or about the 9th day of November, 1830, the said Lydia Carr, widow, the conusee of said judgment, in consideration of the sum of £1859 14s. 7d., of the present currency, paid to her by your suppliant, duly assigned to your suppliant the said judgment obtained against the said Richard Malone, and all money then due, and thereafter to grow due thereon; and a memorial of such assignment having been duly enrolled, pursuant to the provisions of the Statute in that case made and provided, the said judgment is now legally vested in your suppliant.

And your suppliant has caused the same to be duly revived in Hilary Term, 1843, in the name of your suppliant, and your sup-

pliant has also caused the said judgment to be duly registered, pursuant to the Statute in such case made and provided. registered.

Your suppliant sheweth unto your Lordship, that the said Richard Malone, the conusor of said judgment, was, at the time of the rendition thereof, and at the time of making his will, hereinafter mentioned, and at the time of his death, seised and possessed of ALL THAT AND THOSE, the lands of *Grange*, &c. Conusor seised of lands, &c.

Your suppliant further sheweth, that the said Richard Malone being indebted to Thomas Richard Rooper, a confederate hereinafter named, in several other sums, amounting in the whole to the sum of £7,201 7s. 8d., of the present currency, the said Richard Malone agreed to secure the repayment thereof, by a mortgage of ALL THAT AND THOSE, &c., being part of the said estate of *Grange*; and, accordingly, by indenture of mortgage, bearing date on or about the 14th day of May, 1832, and made between the said Richard Malone of the one part, and the said Thomas Richard Rooper of the other part, the said Richard Malone did convey and assure the said lands and premises of, &c., unto the said Thomas Richard Rooper, subject to redemption, on payment of the said sum of £7,201 7s. 8d., and interest after the rate and in the manner therein mentioned; and the said Thomas Richard Rooper, under and by virtue of the said indenture of mortgage, and of the will of the said Richard Malone, hereinafter stated, claims some interest in the lands and premises hereinbefore mentioned. By deed of 14th May, 1832, conusor conveyed lands, &c., to Rooper, subject to redemption.

Your suppliant further sheweth unto your Lordship, that the said Richard Malone, the conusor of your suppliant's said judgment, being so as aforesaid seised of the said lands of, &c., duly made and published his last will and testament in writing, bearing date on or about the 13th day of April, 1830, executed and attested as then by law required for passing freehold estates by devise, and thereby gave, devised, and bequeathed all his estates, real and personal, to Henry O'Connor, therein named, and since deceased, and to the confederates, Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, their heirs, executors, administrators, and assigns, upon the trusts and for the purposes therein expressed and declared of and concerning the same; and said testator thereby charged all his just debts, and also all the debts of his late father, Henry Malone, which should remain unpaid at the time of his decease, upon all and every his real estates, wheresoever situate, to be paid Conusor's will.

out of the rents and profits thereof, in the manner therein mentioned; and said testator thereby directed that his said trustees, their heirs and assigns, should stand and be seised of all and every his real estate, wheresoever situate, upon trust, by and out of the rents, issues, and profits thereof, to raise and levy during the term of the natural life of his sister, Catharine Whitestone, otherwise Malone, one of the confederates hereinafter named, an annuity, yearly rent-charge, or annual sum of £500, during the term of the natural life of his said sister, Catharine Whitestone, for her sole and separate use; and said testator further directed, that his said trustees should stand and be seised of all his estates, subject however, in manner aforesaid, to the payment of all his just debts, and to the debts of his said late father, and to the payment of the annuities and legacies therein and hereinafter mentioned, in trust for the use of his sister, the said Alicia O'Connor, and the said Henry O'Connor, and the survivor of them, for and during the natural lives of the said Alicia and of the said Henry O'Connor, and of the survivor of them, and from and after the decease of the survivor of them, in trust and for the use of Edmund L'Estrange, youngest son of his late kinsman, Colonel Henry Paisly L'Estrange, for and during the term of his natural life, without impeachment of waste, with remainder in tail male to the first and every other son and sons of the body of the said Edmund L'Estrange, with divers remainders over, and the ultimate remainder to his, the said testator's, own right heirs for ever. And the said testator, by his will, devised and bequeathed to Henry O'Connor, the son of his late relative, John O'Connor, the annual sum of £100 sterling, during his natural life, chargeable upon all his estates, and he also bequeathed to the said Thomas Ardill the sum of £1000, the said sum to be charged upon and paid out of all his estates, as by the said will, reference being thereto had, may more fully appear.

1st Codicil.

Your suppliant further sheweth, that the said Richard Malone made a codicil to his said will, bearing date on or about the 30th day of April, 1832, executed in the presence of and attested by three witnesses, and thereby bequeathed to Henry Stepney, and to his brother St. George Stepney, the sum of £1500 each, being in all the sum of £3000; and he directed that said sum of £3000, and the interest thereof, should be at the sole disposal of their mother,

Alicia Stepney, during her life, as by the said codicil, reference being thereunto had, may more fully appear.

Your suppliant further sheweth, that the said Richard Malone 2nd Codicil. made a further codicil to his said will, bearing date on or about the 18th day of December, 1833, and thereby appointed Edward Meadows Dunne, therein named, executor of his will, and he thereby bequeathed to said Edward Meadows Dunne the sum of £1000 sterling, for his own proper use and benefit; and after reciting that by his said will he had left an annuity for his natural life to said Henry O'Connor, junior, therein named, he bequeathed to the said Henry O'Connor, junior, the sum of £200 *per annum*, during his natural life, as an additional annuity, to be paid to him for his own proper use and benefit, the said additional annuity to be paid to him out of, and to be chargeable upon the lands of *Castletown*, in the County of Westmeath, part of the said testator's estate, as by the said last mentioned codicil, reference being thereunto had, may, among other things, more fully appear.

Your suppliant further sheweth, that the said Richard Malone, Conusor's death. the said testator, died on or about the 6th day of January, 1834, unmarried, and without issue, leaving the said Alicia O'Connor, and the said Catharine Whitestone, the wife of the said Michael Henry Whitestone, his sisters and co-heiresses at law, him surviving.

And your suppliant sheweth, that the said Edward Meadows Dunne, Will proved by E. M. Dunne. shortly after the decease of the said Richard Malone, duly proved said will and codicils in Her Majesty's Court of Prerogative in Ireland, and obtained probate thereof forth of the said Court, and is now the executor and personal representative of the said Richard Malone, and, as such executor, has possessed himself of the personal estate of the said Richard Malone.

Your suppliant further sheweth unto your Lordship, that Henry O'Connor, one of the trustees named in the will of the said Richard Malone, departed this life on or about the 25th day of January, 1834, leaving the said Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, his co-trustees, him surviving, who immediately Trustees of will in possession of conusor's estate. after the death of the said testator, Richard Malone, entered into the possession of all the estates of which the said Richard Malone was so as aforesaid seised, and are still in the possession thereof.

Your suppliant further sheweth, that in the month of March, 1838, the said defendant, Edmund L'Estrange, had a son born unto him, and the said son, who is named Saville Richard William L'Estrange, and is one of the defendants hereinafter named, now claims to be the first tenant in tail in remainder, of the said several estates, under the limitations in the will of the said Richard Malone, deceased.

Your suppliant further sheweth, that the said Richard Malone was, at the time of his decease, indebted to various persons in large sums of money ; but your suppliant is wholly unable to set forth the particulars of the said debts, and the persons now entitled thereto, save as hereinbefore mentioned.

Your suppliant further sheweth unto your Lordship, that interest on your suppliant's said judgment was regularly paid by the said Richard Malone, during his life-time, and by the said trustees of his will, after his death, up to the 21st day of August, 1835, when the last payment on foot thereof was made to your suppliant ; and there is now due and owing to your suppliant, for principal and interest, on foot of said judgment, the sum of £2,250 16s. 11d., present currency, up to and ending the 18th day of April, 1839, besides costs.

Applications.

Your suppliant further sheweth unto your Lordship, that your suppliant hath frequently and in a friendly manner applied to the said Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, the trustees named in the will of the said Richard Malone, and also to the said Edward Meadows Dunne, his executor, and personal representative ; and your suppliant has requested them to pay to your suppliant said principal money and interest ; but they have refused so to do, and in order to embarrass your suppliant in the recovery thereof, have possessed themselves of the tenants' leases of said lands, and refuse to deliver them to your suppliant, and allege that there are divers charges and incumbrances thereon, created prior to your suppliant's said demand, but refuse to discover the particulars thereof to your suppliant, or in whom the same are vested.

Combination.

And now so it is, may it please your Lordship, that the said Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, trustees named in the will of the said Richard Malone, combining and confederating with the said Edward Meadows Dunne, the personal

representative of the said Richard Malone, Edmund L'Estrange, Saville Richard William L'Estrange, Thomas Richard Rooper, who claims some interest in said estate by virtue of said indenture of mortgage, Michael Whitestone, and Catharine Whitestone, his wife, and Henry O'Connor, jun., who respectively claim annuities charged on the estate of the said Richard Malone under his will; Henry Stepney, St. George Stepney, and Alicia Stepney, and with divers other persons at present unknown to your suppliant, whose names, when discovered, your suppliant prays she may be at liberty to insert herein, with apt words to charge them as parties defendants hereto, and contriving how to wrong and injure your suppliant in the premises, they, the said Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, and their confederates, absolutely refuse to comply with all such requests, sometimes pretending that the said Richard Malone, by his said will, directed that his debts should be paid out of the rents and profits of his said estates, and not by sale or mortgage thereof, and therefore that your suppliant must remain unpaid, until by perception of the rents and profits of the said estates, all debts and incumbrances affecting the same, which were created prior to the rendition of your suppliant's said judgment, shall have been paid; whereas your suppliant submits and charges that the said Richard Malone could not, by any directions in his will, exonerate the estates of which he was seised, from liability to the payment of the said debt due to your suppliant on foot of said judgment, which is a lien on the said estates. And your suppliant charges that the several title deeds and tenants' leases relating to said estates, are in the possession of the said confederates, or of some of them, but they refuse to discover or produce the same.

All which actings, doings, and pretences of the said confederates, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your suppliant in the premises.

General averment.

In consideration whereof, and forasmuch as your suppliant can only have adequate relief in the premises in a Court of Equity, where matters of this nature are properly cognizable and relievable.

To the end, therefore, that the said Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, Edward Meadows Dunne, Edmund L'Estrange, Saville Richard William L'Estrange, Michael Whitestone, and Catharine Whitestone, his wife, Henry O'Connor,

Interrogating part.

Henry Stepney, St. George Stepney, and Alicia Stepney, and their confederates, when discovered, may, if they can, shew why your suppliant should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say :

1. Whether the said Lydia Carr, the mother of your suppliant, did not, in or as of Hilary Term, 1819, or in or as of any and what other Term, obtain such judgment against the said Richard Malone, and for such penal sum as in bill mentioned, or how otherwise ?

2. Whether the said Lydia Carr did not, in consideration of such sum as in bill mentioned, or of some other, and what sum, assign such judgment, and all money then due, and thereafter to grow due thereon, to your suppliant, or how otherwise ?

3. Whether your suppliant did not cause said judgment to be duly revived, and also to be duly registered, at the time, and in manner in bill mentioned, or how otherwise ?

4. Whether the said Richard Malone, the conusor of said judgment, was not at the time of the rendition thereof, and of making his will, and of his death, seised and possessed of such estates, and in such manner and for such interests respectively, as hereinbefore mentioned, or how otherwise ?

5. Whether the said Richard Malone was at the said periods respectively, or at any and which of them, seised of any, and what other lands and premises, and for what estate, and where situate, besides those hereinbefore mentioned ; and if so, what was the title of the said Richard Malone thereto ?

6. Whether the said Richard Malone did not execute to the said Thomas Richard Rooper such indenture of mortgage, of such date, purport, and effect respectively, as in bill mentioned ; and whether, under and by virtue of the said mortgage, and of the will of the said Richard Malone, the said Thomas Richard Rooper does not claim some, and what estate or interest in the lands and premises in bill mentioned, or some and which of them ?

7. Whether the said Richard Malone, being so seised as aforesaid,

did not duly make and publish such will, and such two several codicils thereto, of such date, purport, and effect respectively, as hereinbefore mentioned ; or what were the date, purport, and effect of said will and codicils respectively ?

8. Whether the said Richard Malone did not depart this life about the time in bill mentioned, leaving his sisters, the said Alicia O'Connor and Catharine Whitestone, his co-heiresses at law ; or how otherwise ?

9. Whether the said Edward Meadows Dunne has not proved the will of the said Richard Malone, and obtained probate thereof forth of the Court of Prerogative in Ireland, or of some other Ecclesiastical Court of competent jurisdiction ; and whether he hath not possessed himself of the personal estate of the said Richard Malone, or how otherwise ?

10. Whether the said Henry O'Connor, one of the trustees named in the will of the said Richard Malone, did not depart this life about the time in bill mentioned, leaving the said Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, his co-trustees, him surviving, and whether the said co-trustees have not entered into possession of all the estates of which the said Richard Malone died seised, or of some and which of them, and are not still in possession thereof ; or if not, who is in possession, and in receipt of the rents and profits thereof ?

11. Whether interest on foot of her said judgment was not paid regularly to your suppliant by the said Richard Malone during his life-time, and by the said trustees of his will after his decease, up to the 21st day of August, 1835, as in bill mentioned, or when was the last payment made on foot thereof ; and whether there is not now due to your suppliant on foot thereof, the sum of £2,250 16s. 11d., or some other and what sum, up to and ending the 18th day of April, 1839, or some other and what day, besides costs, as hereinbefore stated ?

12. Whether your suppliant hath not made such applications to the said Edward Meadows Dunne and the said trustees, as in bill mentioned ; and whether they have not refused to comply therewith, and why have they so refused ?

13. What right, title, or interest do the defendants respectively claim in or to the said several hereditaments and premises of which the said Richard Malone died seised, or in any and what part thereof

respectively; and how do they respectively make out and derive such title and interest, and by and under what deed or deeds, writing or writings?

14. What are the names and places of abode of all and every such person and persons in whom any legal or equitable estate, right, title, or interest, charge, or incumbrance in, to, or upon the said estates respectively, or any of them, is vested, and the particulars of such estate, right, title, or interest, charge, or incumbrance, and how and in what manner did the same become vested in such person or persons, and under what deed or deeds, writing or writings; and if the said defendants shall pretend or allege that there is or are any mortgages or incumbrances affecting the said estates, or any part thereof respectively, either prior or subsequent to the rendition of your suppliant's said judgment, let them set forth the dates and parties' names, and descriptions, and short material contents of such mortgages or incumbrances respectively, and when made, and for what considerations, and what estate is affected thereby, and the sum due thereon, and the person or persons now entitled thereto respectively; and let the said Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, set forth a true and correct list of the creditors of the said Richard Malone, and of Henry Malone, his said father, distinguishing the sums due to each, and the nature and date of the security for each debt, and the estate affected thereby respectively; and the sums paid to each since the death of the said Richard Malone; and that the said Edward Meadows Dunne may either admit assets of the said testator, Richard Malone, sufficient for the purpose of paying the amount of your suppliant's said demand, together with your suppliant's costs of suit, or else may set forth a full and particular account of all and every part of the said Richard Malone's personal estate received by him, or for his use, with the nature, quantity, and value thereof, and how the same has been applied, and what now remains undisposed of; and that the said defendants may also set forth in whose hands is now each one of the several deeds hereinbefore mentioned, as fully and particularly as if each of the said several deeds were here again stated and referred to, and all other deeds relating to the said lands and estates, and all such deeds as, in case of a sale of the said lands and estates, would be necessary for enabling your suppliant to make title to a

purchaser. Let the said defendants set forth true and accurate rent-rolls of the said estates, and of the leases and agreements under which the same or any of them have or has been demised, and their respective dates, terms, and descriptions, and the number of acres in each, and by whom and to whom made, and where respectively situate, in what parish, barony, and county, and at what rents; and let the said defendants set forth whether there are any other and what persons having charges, or incumbrances, or interests in the said lands and premises, which would render them necessary parties to this suit. If yea, who are they, and what are their names and interests, and where do they respectively reside ?

And that it may be referred to one of the Masters of this honourable Court to take an account of the sum due to your suppliant for principal, interest, and costs on foot of the said judgment, so as aforesaid vested in your suppliant.

Prayer.
Account of the
sum due on
judgment;

And also to take an account of the personal estate of the said Richard Malone, deceased, the nature, particulars, and value thereof; into whose hands the same have come, and how applied.

of personal es-
tate of conusor;

And also to take an account of the debts, legacies, and funeral expenses of the said Richard Malone.

of his debts,
&c. ;

And also to take an account of the real and freehold estates of the said Richard Malone, and of the rents, issues, and profits thereof, and into whose hands the same have come since the decease of the said Richard Malone, and how the same have been applied and disposed of.

of his real es-
tates ;

And also to take an account of all charges and incumbrances affecting the estates of the said Richard Malone, and the nature and priority thereof.

and of incum-
brances.

And, if necessary, that an account may be taken of the real and personal estates of Henry Malone, the father of the said Richard Malone, deceased, and of his debts, legacies, and funeral expenses.

And that such of the defendants as ought so to do, may be decreed to pay to your suppliant, and to such other parties as may be entitled to the benefit of the decree, the sums which shall be found due to them respectively, together with their costs, by a short day to be named for that purpose : or, in default thereof, that a sale may be decreed of such of the said real estates as your Lordship shall direct, or a competent part thereof, sufficient to discharge your sup-

Payment.

Sale.

pliant's said demand, together with all other demands and charges affecting the same, your suppliant being willing, and hereby offering to redeem such of the incumbrances affecting said real estates, as your Lordship shall consider her bound to redeem.

Receiver.

And that in the meantime a Receiver may be appointed to receive the rents, issues, and profits of the said real estates, or of such part thereof as your Lordship shall see fit, and that all proper accounts may be taken, and all necessary directions given; and that the said defendants may respectively bring in, and deposit with the proper officer of this Court, all such of the title-deeds, tenants' leases, and other documents hereinbefore inquired after, as they shall admit to be in their possession or power; and that your suppliant may have such further and other relief in the premises as to your Lordship shall seem meet. May it therefore please, &c.

Pray subpoena to appear and answer against

Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill
[*trustees of conusor's will*];

Edward Meadows Dunne [*personal representative of conusor*];

Edmund L'Estrange [*devisee for life*];

Saville Richard William L'Estrange [*first tenant in tail under conusor's will*];

Thomas Richard Rooper [*mortgagee*];

Henry O'Connor, Michael Whitestone, and Catharine his wife
[*annuitants*];

And pray that Henry Stepney, Saint George Stepney, and Alicia Stepney (respectively claiming legacies charged on real estate of conusor by his will), upon being served with notice, pursuant to the 15th General Rule, may be bound, as ante, 339.

As to the necessity of having the legatees before the Court in this case, when the legal estate, being outstanding in the mortgagee, is not in the trustees of the conusor's will, see *ante*, p. 297, and *Turner v. Hind, sup.* (12 Sim. 414).

Prayer of Bill by judgment Creditor, in a Suit to administer the real and personal Assets of his Conusor, who died intestate.

And that an account may be taken of what is due to your sup-
 pliant for principal, interest, and costs, on foot of the judgment, so
 as aforesaid obtained by your suppliant against the said [*intestate*];
 and also an account of all the other debts, funeral and testamentary
 expenses of the said [*intestate*]; and of his personal estate and
 effects, and of the real and freehold estates of which the said [*intes-*
tate] was seised, or to which he was entitled at the time the said
 judgment was obtained against him, or at any time subsequent
 thereto; and of the rents and profits from the time of the said
 [*intestate's*] death, of such part of his said real estates as he was
 seised of at the time of his decease; and also an account of all
 charges and incumbrances affecting the said lands and premises, and
 the nature, priority, and amount thereof, and what is due thereon
 respectively; and particularly an account of what is due to the de-
 fendant, Richard Magrath, on foot of the mortgage, so as aforesaid
 vested in him, after all just credits and allowances; and that the
 personal estate of the said [*intestate*] may be applied in a due
 course of administration; and that your suppliant, and all other per-
 sons entitled, may be paid their respective demands; and for that
 purpose that the real and freehold estates of the said [*intestate*] may
 be sold, and that all proper parties may be decreed to join in such
 sale. And that in the meantime a Receiver may be appointed to
 receive the rents and profits of the said lands and premises which
 were the property of the said [*intestate*]; and that all proper
 and necessary directions may be given for the purposes aforesaid,
 and for the payment of your suppliant's demand [*and for general*
relief].

Account of
 plaintiff's de-
 mand,

and of all other
 debts, &c., of
 intestate;
 and of his per-
 sonal estate;
 and of his real
 estate;

of the rents
 since his death;

and of all
 charges there-
 on;
 and the priority
 of same.

Account of sum
 due to defend-
 ant, a mort-
 gagee;
 administration
 of the assets;
 payment
 to creditors;

sale of free-
 holds.

Receiver.

General relief.

Prayer of Bill by judgment Creditor, against the Heir and Assignee of the Conusor, who had been discharged as an Insolvent, and had died before the year 1840 ; and also against an ELEGIT Creditor of the Conusor, who had been in possession many Years.

Prayer.
Account of
plaintiff's de-
mand ;

and of real es-
tate of conusor ;
and of charges
thereon :
and of rents, &c.

account of sum
due to *elegit*
creditor in pos-
session ;

and of the sum,
if any, due by
him.

Sale.
Payment.

Offer to redeem.

Receiver and
general relief.

And that it may be referred to one of the Masters of this honourable Court to take an account of the sum due to your suppliant, for principal, interest, and costs, on foot of the judgment so as aforesaid obtained by your suppliant against the said John Jones, deceased ; and also to take an account of the real estate of the said John Jones now remaining undisposed of, and of the debts and incumbrances affecting the same, and their respective priorities ; and also to take an account of the rents and profits of such real estate as the said John Jones was seised of at his death ; and also to take an account of all sums received or levied by the said John Walshe, in respect of his said judgment or *elegit*, from and out of the real or personal property of the said John Jones, and out of the said rents and tithes received by him, or which, without wilful default, he might have received, since the filing of this your suppliant's bill of complaint ; and also an account of the sum, if any, remaining due to the said John Walshe on foot of his said demand ; and that the sum, if any, due by the said John Walshe to the estate of the said John Jones, may be brought into court, and placed to the credit of this cause ; and that the rent-charges in lieu of tithes hereinbefore mentioned, and the fee and inheritance thereof, may be sold ; and that your suppliant and the other creditors of the said John Jones, may be paid out of the produce of such sale the sum which shall appear due to them respectively ; your suppliant being willing, and hereby offering to redeem such of the incumbrances on said real estates, as your Lordship shall consider him bound to redeem [*and for a Receiver and general relief, as in last precedent*].

Bill by a judgment Creditor on behalf of Himself and the other Creditors of the Intestate, against his Administrator and Heir-at-Law, praying a Sale of mortgaged Premises, to pay off a Mortgage made to the Plaintiff, and in Case of a Deficiency, to be admitted a Creditor on the general Assets of the Intestate; praying also an Account of the Intestate's personal Estate, and to have the same duly administered.

To the, &c.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant, John Jones, of, &c., on behalf of himself and all other the creditors of William Styles, who shall in due time come in and contribute to the expense of this suit.

That the said William Styles, being seised to him and his heirs in feesimple of and in certain lands, tenements, and hereditaments known by the name of *Grange*, situate, &c., and having occasion for the sum of £1000 sterling, applied to your suppliant to lend him said sum, which your suppliant agreed to do, on having the same, together with the legal interest thereon, secured in manner hereinafter mentioned.

Intestate seised
of freehold
lands, &c.

applied to
plaintiff for
loan.

Your suppliant further sheweth, that accordingly, by indenture bearing date on or about the 1st day of June, 1839, and made between, &c., in consideration of the sum of £1000 then lent and advanced to him by your suppliant, the said William Styles conveyed and assured to your suppliant, his heirs and assigns, the said lands, tenements, and hereditaments of *Grange*, with the appurtenances thereunto belonging, subject to a proviso for redemption thereof on payment by the said William Styles, his heirs, executors, or administrators, of the said sum of £1000, together with interest thereon, after the rate of £5 *per cent. per annum*, on the 1st day of December, 1839; and in the said indenture is also contained a covenant by and on the part of the said William Styles, his heirs, executors, and administrators, for payment of the said principal sum of £1000, with interest thereon, after the rate aforesaid, on the day in the said proviso for redemption named.

Mortgage by
intestate to
plaintiff for
£1000.

Covenant in
mortgage-deed
for payment.

As by the said indenture, &c.

Intestate gave
bond collateral.

Your suppliant further sheweth, that for further, better, and more effectually securing the repayment of the said sum of £1000 and interest, the said William Styles duly executed to your suppliant his bond or obligation in writing, bearing even date with said indenture of mortgage, with warrant of attorney for confessing judgment thereon, in the penal sum of £2000 sterling, with a condition thereunder written for making void the same, upon payment of the said sum of £1000, with interest, after the rate aforesaid, on the said 1st day of December, 1839.

Judgment entered on bond.

Upon which bond, by virtue of the said warrant, your suppliant, in or as of Michaelmas Term, in the said year 1839, obtained judgment in Her Majesty's Court of Queen's Bench in Ireland, against the said William Styles, for the said sum of £2000, together with the costs of entering the said judgment, as by the records of said Court may appear.

Death of intestate ;

leaving defendant his heir-at-law.

Your suppliant further sheweth, that the said William Styles departed this life on or about the 1st day of May, 1842, intestate, and without issue, leaving John Styles of, &c., his only brother and heir-at-law, the defendant hereinafter named, him surviving, whereupon the said lands and premises of *Grange* descended to and became vested in the said John Styles, subject to the said mortgage.

Defendant administrator.

Your suppliant further sheweth, that upon or soon after the death of the said intestate, the said John Styles procured letters of administration of the goods, chattels, personal estate, and effects of his said late brother to be granted to him by and out of the proper Ecclesiastical Court, and by virtue thereof hath possessed himself of the personal estate and effects of the said intestate, to a considerable amount.

Interest on mortgage paid during life of intestate.

Principal still due with interest from death of intestate.

Your suppliant further sheweth, that the said intestate, in his lifetime paid the interest due to your suppliant upon the said mortgage up to the 1st day of December, 1841, but the whole of the said principal sum of £1000, together with all interest thereon, from the said 1st day of December, 1841, now remains due to your suppliant.

Mortgaged premises scanty security.
Plaintiff entitled to sale,

Your suppliant further sheweth, that the premises comprised in the said mortgage, are a scanty and insufficient security for payment of the sum due to your suppliant, and your suppliant is advised that he is entitled to have the premises comprised in said mortgage sold, and to have the produce of such sale applied, so far as the same will

extend, in payment of the said principal sum of £1000, and interest, and to be admitted as a specialty creditor against the general assets of the said intestate for the deficiency, and also as a judgment creditor in respect of his said judgment so obtained as aforesaid.

and to be admitted as judgment and specialty creditor against general assets for deficiency.

Your suppliant further sheweth, that he hath, by himself and his agents, &c. [*state applications to defendant for the purposes aforesaid, and refusals, and proceed thus*] : and the said defendant sometimes pretends that the personal estate of the said intestate is small and inconsiderable ; whereas your suppliant charges the contrary thereof to be the truth, and so it would appear if the said defendant would set forth, as he ought to do, a full and true account of the personal estate and effects of the said intestate, and of his application thereof.

Applications.

Pretences.

All which actings, &c.

To the end, &c. (p. 309). [*Interrogate fully to the stating and charging parts, and proceed thus*] :

Interrogating part.

And that the said defendant may answer the premises ; and that an account may be taken of the sum remaining due to your suppliant for principal and interest on the aforesaid mortgage security ; and that the said mortgaged premises may be sold, and the produce thereof applied, so far as the same will extend, in satisfaction of what shall be so found due ; and that your suppliant may be admitted as a creditor against the general assets of the said intestate, in respect of the deficiency ; and that an account may be taken of the said intestate's personal estate and effects possessed or received by the said defendant, or by any other person or persons, by his order or for his use ; and also an account of the said intestate's funeral and testamentary expenses and just debts ; and that the said personal estate and effects may be applied in payment of what shall remain due to your suppliant in respect of the matters aforesaid, and of the other creditors of the said intestate, in a due course of administration. [*And for further relief, &c.*] See *King v. Smith*, 2 Hare, 239 ; *O'Kelly v. Bodkin*, 2 Ir. Eq. R.361 ; *Marshall v. M'Aravey*, 3 Dru. & War., 232.

Prayer.

Account of sum due on foot of mortgage.

Sale,

that plaintiff may be admitted against general assets for deficiency.

Account of personal estate received by defendant ;

and of funeral and testamentary expenses and debts.

Payment out of personal estate.

Bill against Executor for Payment of a Legacy out of personal Estate.

To the, &c.

In Chancery.

Humbly complaining sheweth unto your Lordship, your suppliant, John Warren, of, &c.

Will of testator,

giving legacy to plaintiff, and appointing defendant executor.

Death of testator.

Defendant proved,

and took possession of personal estate.

Applications for payment.

Charge of confederacy.

Pretences ;

1. No will duly executed.

Charge the contrary.

That John Brown, of, &c., deceased, duly made and published his last will and testament in writing, bearing date on or about the 1st day of May, 1840, executed and attested as by law required ; and thereby, among other bequests, gave to your suppliant the sum of £500 sterling, and appointed the defendant, John Styles, the sole executor of his said will, as by the probate of said will, when produced by the said defendant, will appear.

And your suppliant further sheweth, that the said John Brown departed this life on or about the 2nd day of May, 1840, without having altered or revoked his said will.

And the said John Styles, soon after the death of the said testator, duly proved the said will in the proper Ecclesiastical Court, and obtained probate thereof, and took upon himself the burden of the execution thereof, and hath since possessed himself of the personal estate and effects of the said testator, to an amount much more than sufficient for the payment of his just debts, funeral and testamentary expenses, and legacies ; and your suppliant further sheweth, that he hath repeatedly, and particularly by letter from your suppliant to the said John Styles, dated the 1st day of June, 1842, applied to the said John Styles for payment of the said legacy, and interest due thereon, and your suppliant hoped that such his reasonable requests would have been complied with, as in justice and equity they ought to have been.

But now so it is, &c. (*ante*, p. 17).

Sometimes pretending that the said testator did not make and execute his last will and testament of such date, purport, and effect as hereinbefore mentioned and set forth, and that therefore your suppliant is not entitled to his said legacy ; whereas your suppliant expressly charges the contrary of such pretence to be true, and that

the said testator in his life-time did duly make his last will and testament in writing, of such date, purport, and effect, as hereinbefore mentioned, so far as the same is herein set forth, and that the same was duly executed and attested as is by law required, and that by virtue thereof your suppliant is well entitled to the said legacy of £500, and so the said defendant at other times admits the truth to be.

But then he pretends, that the personal estate and effects of the said testator, which have come to his hands, were very small and inconsiderable, and not more than sufficient to answer and satisfy his just debts, and funeral and testamentary expenses; whereas your suppliant expressly charges, that the personal estate and effects of the said testator which have come to the hands of the said defendant are of very considerable value, and are much more than sufficient to satisfy his just debts, funeral and testamentary expenses, and the legacies of the said testator; and so it would appear if the said defendant would set forth a full, true, and particular account of the said personal estate, and how, and in what manner, and to whom, and for what, the same and every part thereof has been applied or disposed of; but which he refuses to do, or to give your suppliant any satisfaction in respect of your suppliant's said demand.

2. No assets to pay plaintiff.

All which actings, &c. (*ante*, p. 18).

General averment.

To the end, therefore, that the said defendant may, if he can, shew why your suppliant should not have the relief hereby prayed, and may, upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make, to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written he is required to answer, that is to say:

Interrogating part.

1. Whether the said testator did not duly make and publish his last will and testament in writing, of such date, and to such purport, and effect, as is hereinbefore in that behalf mentioned, or of some and what other date, and to some and what other purport and effect?

2. Whether the said testator did not afterwards depart this life without altering or revoking his said will, or how otherwise, and whether the said defendant did not thereupon prove the said will in

some and what Ecclesiastical Court, and whether he did not obtain probate, and take upon himself the execution of said will, or how otherwise ?

3. Whether by virtue of said probate, or in some and what other right, the said defendant did not possess himself of all, or of some and what part of the said testator's personal estate and effects, and to what amount, and whether to an amount sufficient to answer and pay all the said testator's just debts, funeral and testamentary expenses, and legacies ?

4. Whether your suppliant has not made such applications to the defendant as hereinbefore in that behalf mentioned, and whether the said defendant has not refused, and does not still refuse to comply with such requests, and why does the said defendant so refuse ; and that the said defendant may set forth and discover a full, true, and particular account of all and singular the personal estate and effects which were of the said testator at the time of his death, together with the nature, kinds, quantities, qualities, true and utmost value thereof, and of every part thereof, and how much and what part of the said personal estate and effects have been received by, or come to the hands, possession, or power of the said defendant, or of any person or persons, and whom, by name, by his order, or for his use, and how the same, and every part thereof, hath been paid, applied, or disposed of, and administered, and to whom, and for what, and upon what account, cause, or consideration, and whether any and what part thereof is still remaining outstanding or to be got in and administered, and where, and in whose hands, possession, or power, the same now is, and why the same has not been got in, and what is the amount thereof ?

Prayer.

Account of personal estate of testator ;

debts, &c.
Sum due on plaintiff's legacy.

That assets may be administered.

And that the said defendant may admit assets for payment of your suppliant's said legacy, or else that an account may be taken, under the decree of this honourable Court, of the personal estate and effects of the said testator, into whose hands the same came, and how applied and disposed of ; and also an account of his debts, legacies, and funeral and testamentary expenses, and, in particular, an account of the sum due and owing to your suppliant on foot of the said legacy of £500, so bequeathed to your suppliant ; and that the assets of the said testator may be applied in a due course of administration ; and that thereout your suppliant may be fully paid and

satisfied the sum which shall appear to be due and owing on foot of Payment.
the said legacy, together with your suppliant's costs of suit; and
that your suppliant may have such further and other relief as the General relief.
nature of the case may require, and to your Lordship shall seem
meet. May it please, &c.

Pray subpoena to appear and answer against John Styles [sole executor].

The defendant, John Styles, is required to answer the several interrogatories numbered 1, 2, 3, 4.

Bill by Legatees entitled to one Moiety of the residuary personal and real Estate, praying that the Trusts of the Will may be carried into Execution, and for a Receiver.

To the Right Honourable the Chancellor, Treasurer, &c.

In the Exchequer.

Humbly complaining, shew unto your Lordships, your suppliants William Jones, of, &c., and Jane his wife, James Jones, of, &c., John Jones, of, &c., and Thomas Jones, of, &c., the only surviving children of your suppliants, William and Jane, Her Majesty's debtors.

1. That Mary Crow, late of, &c., spinster, being, at the respec- Mary Crow,
tive times of making her will and of her death, seised of certain being seised of
freehold estates, and possessed of leasehold and other personal pro- real, and pos-
perty, and being of sound mind, memory, and understanding, duly sessed of per-
made and published her last will and testament in writing, bearing sonal estate,
date the 1st day of May, 1840, executed and attested as by law made her will,
required, and thereby, after certain specific bequests she gave and dated 1st May,
devised unto John Doe, of, &c., cabinet-maker, and Richard Roe, 1840,
of, &c. stationer, all her freehold and leasehold messuages, farms, devising to de-
lands, tenements, and hereditaments lying and being in, &c., afore- fendants real
said, respectively, or elsewhere, and also all her monies, securities and
for money, stock in the public funds, goods, chattels, and effects, personal estate.
and all other her real and personal estate whatsoever, not thereinbe-

	fore given or disposed of, to hold the same unto the said John Doe and Richard Roe, their heirs, executors, administrators, and assigns, subject as to her personal estate, to the payment of her just debts, and funeral and testamentary expenses thereout, upon trust <i>[to let the lands and receive the rents, and invest same, together with all other monies in their hands ; and as to one moiety of her said trust estate and premises upon trust for the said John Doe, and for testatrix's nephews, John Smith, James Smith, and William Smith, to be divided equally among them, with benefit of survivorship in the event of the death of any of them, in the life-time of the testatrix, without issue. And as to the other moiety, upon trust that the said John Doe and Richard Roe should receive the rents, issues, and profits, interest, dividends, and annual produce thereof, and out of the same should pay unto plaintiffs, William Jones and Jane his wife, weekly during their joint lives, the sum of £1 sterling, and in case plaintiff, Jane, should survive her said husband, William Jones, then to pay to plaintiff, Jane, weekly during her life the sum of 15s. ; and as to residue of rents, &c. of said moiety, upon trust to invest same, and to receive the interest, &c., and again lay out and invest same in like manner, so as to form an accumulating fund in the nature of compound interest during the life of plaintiff, Jane, and to stand possessed of the same stocks, funds, or other securities, upon trust after the decease of plaintiff, Jane, for her children, as tenants in common]</i> .
Upon trust,	
as to one moiety for	
John Doe, John Smith, James Smith, and Wm. Smith equally.	
And as to remaining moiety,	
subject to weekly allowance to plaintiffs, Jones and wife,	
upon trust,	
to accumulate during life of plaintiff, Jane, for her children, as tenants in common.	
John Doe and Richard Roe, executors.	And the said testatrix thereby nominated and appointed the said John Doe and Richard Roe to be joint executors of her said will, as in and by the said will or the probate copy thereof, when produced, will more fully appear.
Testatrix's death.	2. Your suppliants further shew unto your Lordships that the said testatrix departed this life on or about the 1st day of January, 1844, and that she left Henry Styles, of, &c., her nephew and heir-at-law ; and that upon her death the said John Doe and Richard Roe duly proved her said will in the proper Ecclesiastical Court, and entered into possession of her real estates, and possessed themselves of her personal estate, which was much more than sufficient for payment of her debts, and funeral and testamentary expenses.
Henry Styles her heir-at-law.	
Probate by executors, who possessed themselves of real and personal estate.	
Plaintiffs, James, John, and Thomas	3. Your suppliants further shew unto your Lordships that your suppliants, James, John, and Thomas, are the only issue of your

suppliants, William and Jane, and that your suppliants, William and Jane, never had any issue except one child, who died in the life-time of the said testatrix. the only issue of plaintiffs Jones and wife.

4. Your suppliants further shew unto your Lordships that the said John Smith, James Smith, and William Smith are all living, and upon the death of the said testatrix became entitled jointly with the said John Doe to one moiety of her estate. John, James, and William Smith entitled to moiety jointly with John Doe.

5. Your suppliants further shew, that the said John Doe was indebted to the said testatrix, at the time of her death, in a considerable sum of money upon a balance of account between them, the said John Doe having received considerable sums of money on account of the said testatrix in her life-time.

6. Your suppliants further shew, that your suppliants are entitled to or interested in one moiety of the clear residue of the said testatrix's estate, and entitled to have the same invested and secured for their benefit, and that the said John Doe and Richard Roe have accordingly purchased, and there are standing in their names, on account of the share of such residue to which your suppliants are entitled, some considerable sums of stock. Plaintiffs entitled to remaining moiety, which was invested in stock by executors.

7. Your suppliants further shew that the said John Doe and Richard Roe are persons in an humble situation in life, and possessed of little or no property, the said John Doe being a working cabinet maker, and the said Richard Roe being a stationer in a small way of business; and that it will be for the benefit of your suppliants that the fund to which they are entitled should be secured in this honourable Court. Executors in humble life, without property.

8. Your suppliants further shew unto your Lordships that the said John Doe and Richard Roe have now in their hands considerable sums of money, part of the residue of the said testatrix's estate, and that they are in receipt of the rents and profits of the said testatrix's freehold and leasehold estates; and that for several years they retained in their hands, and employed for their own benefit, a considerable part of the surplus income of that moiety of testatrix's estate in which your suppliants are interested, after paying the said allowance of £1 a-week to your suppliants, William, and Jane, his wife. Executors in receipt of rents, &c.; large balance in hands.

9. Your suppliants further shew unto your Lordships, that they have, both by themselves and their agents, and in a friendly Applications.

manner, applied to the said John Doe and Richard Roe to render unto them an account of what is due to them in respect of the moiety of the property of the said Mary Crow, and to carry into execution the trusts of the said will.

Combination.

But now so it is, may it please your Lordships, that the said John Doe and Richard Roe, combining and confederating with the said Henry Styles, John Smith, James Smith, and William Smith, and divers other persons, &c. (*ante*, p. 17), absolutely refuse to comply with the said requests of your suppliants; sometimes pretending that there is little or no surplus of the said testatrix's estate after payment of her debts, funeral and testamentary expenses, whereas your suppliants charge the contrary, and that so it would appear if the said John Doe and Richard Roe would set forth a full, true, and particular account of their receipts and payments on account of the said testatrix's estate, and of the particulars of the property of the said testatrix.

Pretences.

And your suppliants further charge that the said defendants have, or lately had in their possession, custody, or power, divers books, accounts, books of account, letters, copies of letters, extracts of letters, memoranda, and writings relating to the matters hereinbefore mentioned, and that they ought to deliver the same to your suppliants, but they refuse so to do.

And your suppliants charge that the said Henry Styles, as the heir at law of the said testatrix, sometimes disputes her will.

Interrogating
part.

To the end, therefore, that the said defendants may, if they can, shew why your suppliants should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several paragraphs and interrogatories herein contained, as are pointed out by their respective numbers in the note hereunder written, to be answered by each defendant respectively, that is to say :

10. Whether the said Mary Crow did not make such will, of such date, purport, or effect, as hereinbefore mentioned, or of some other, and what date, purport, or effect ?

11. Whether she did not depart this life about the time hereinbefore mentioned, or when did she die ?

12. Whether she did not leave the said defendant, Henry Styles, her nephew and heir at law, or how otherwise ?

13. Whether the said defendants, John Doe and Richard Roe, did not prove the said will in the proper, or some and what Ecclesiastical Court, and did not, immediately upon her death, or at some other time, and when particularly, enter into possession of the real and personal estate of the said testatrix ; and was not said personal estate of very large amount, and much more than sufficient for payment of the debts, funeral and testamentary expenses of the said testatrix, and what was the amount and value thereof in the whole ?

14. Was not the said defendant, John Doe, indebted to the said testatrix, at the time of her death, in a considerable sum of money, or to some and what amount, and on what account ?

15. Are not your suppliants entitled to or interested in one moiety, or some other and what share or portion of the clear residue of the said testatrix's estate ; and have not the said defendants, John Doe and Richard Roe, or either and which of them, purchased on account of your suppliants' said share, and are there not now standing in the names or name of the said defendants, John Doe and Richard Roe, or of either and which of them, some sums or sum of bank or other and what stock, and what is the amount of such stock, and where and in whose names or name is the same now standing, and when and with what monies was the same purchased, and was any of said stock subsequently sold out, and if so, when, and by whom, and how much, and what did the said stock produce, and how has the remaining portion of said residue been applied or disposed of ?

16. What are the station in life and circumstances of each of the said defendants, John Doe and Richard Roe ?

17. Have the said defendants, John Doe and Richard Roe, or either of them, in their hands, custody, or power, any, and if so, what portion of the residue of the said testatrix's personal estate, and who is in receipt of the rents and profits of the freehold and leasehold estate of the said testatrix, and of every part thereof respectively, and have not the said John Doe and Richard Roe, or either and which of them, for several years, or for some and what period, retained in their or his hands, or employed for the benefit of themselves or of either of them, a considerable part, and how much in the whole, of the clear surplus income of that moiety of the said testatrix's estate

in which your suppliants are interested, after paying the said weekly allowance to your suppliants, William and Jane, or, if not, how has the same and every part of said surplus been disposed of?

18. Have not your suppliants made such applications to the said John Doe and Richard Roe as in bill mentioned, and have they not refused to comply therewith, and why have they so refused?

19. Have not the said defendants, John Doe and Richard Roe, or has not either and which of them, in their or his possession or power, some and what books, accounts, books of account, letters, copies of letters, and extracts of letters, memoranda and writings relating to the matters hereinbefore mentioned, or to some and which of them, and what has become of such of the aforesaid particulars as are not now in the power of them or of either of them, and in whose possession or power were the same and every of them, when they or either of them last saw or heard of the same respectively?

Prayer.

Will establish-
ed.

Account of per-
sonal estate,

and of rents of
real estate since
testatrix's
death,

and of debts,
&c.

Account of sum
due testatrix at
her death by
John Doe.

That moiety of
residue may be
secured for
plaintiffs;

and surplus, af-
ter payment of
weekly sum, in-
vested.

Receiver.

Payment into
Court of plain-
tiffs' share of
residue.

General relief

And that the said defendants may answer the premises; and that the will of the said testatrix may be established, and the trusts thereof performed and carried into execution; and that an account may be taken of the personal estate of the said testatrix, into whose hands the same has come, and how applied and disposed of, and also an account of the said testatrix's real estate, and of the rents and profits thereof since her death, and also an account of her debts, funeral and testamentary expenses.

And that an account may be taken of what was due to the testatrix, at the time of her death, from the said John Doe; and that the clear residue of the said testatrix's estate may be ascertained, and that one moiety thereof may be secured for the benefit of your suppliants, according to their respective interests therein; and that the said annuity of £1 per week may be paid thereout to your suppliants William, and Jane his wife; and that the surplus income may be invested to accumulate.

And that a Receiver may be appointed by this honourable Court to collect and get in the rents, issues, and profits of the freehold and leasehold estates of the said testatrix; and that what may appear due to your suppliants, James, John, and Thomas, in respect of their moiety thereof, may be paid into this honourable Court for their benefit.

[*And for further relief, &c.*]

Praysubpœna against John Doe, Richard Roe, and Henry Styles, and pray that John Smith, James Smith, and William Smith, on being served with a copy of the bill, pursuant to the 9th General Order, may be bound by the proceedings, as ante, p. 310.

The defendants, John Doe and Richard Roe [*executors and trustees of testatrix's will*], are required to answer the paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, and the interrogatories numbered respectively 10, 11, 12, 13, 14, 15, 16, 17, 18, 19.

The defendant Henry Styles [*heir of testatrix*] is required to answer the paragraph numbered 1, and the interrogatory numbered 12, respectively.

A strong case must be made shewing actual insolvency, misconduct, waste, misapplication of the property, or danger of loss of the funds, in order to induce the Court to appoint a Receiver, and take the disposition of personal assets out of the hands of the personal representatives; *Anon.*, 12 Ves. 4; *Havers v. Havers*, Barn. C. C. 22; and in the case of an executor especially, for he not only has the legal title as well as the administrator, but he has been selected and intrusted by the testator himself. If, however, several persons have been appointed executors, and one or more of them either decline to act, or else consent to the appointment of a Receiver, this very much strengthens the application, for the testator did not intend to trust the acting executors alone; *Middleton v. Dodswell*, 13 Ves. 266; *Brodie v. Barry*, 3 Mer. 695; and see *Scott v. Becher*, 4 Price, 346.

The Court will now order an executor to bring in so much of testator's property as he admits by his answer to be in his possession; *Blake v. Blake*, 2 Sch. & Lef. 26; and an affidavit may be used for the purpose of ascertaining the result of the schedules to the answer; *Quarrell v. Beckford*, 14 Ves. 177; *Black v. Creighton*, 2 Mol. 554.

Prayer of Bill to compel Payment of a weekly Sum bequeathed by Will.

And that your suppliant may be declared entitled, under the said will of the said testator, to be paid the said legacy of £1 per week during her life, and that it may be declared that the first payment thereof became due on the first day of June, 1844, being the end of

That plaintiff's rights be declared.

Account of sum due. a week next after the death of the said testator ; and that an account may be taken under the direction of this honourable Court, of what is due and owing to your suppliant, on foot of the said weekly sum ; and that the said defendant may either admit assets sufficient for the payment of the sums due, and which shall accrue due on foot of your suppliants' said legacy, or, in default thereof, that an account may be taken of the personal estate and effects of the said testator, into whose hands the same have come, and how applied and disposed of, and what part thereof is still outstanding, and also an account of his debts, legacies, and funeral and testamentary expenses.

Account of personal estate of testator.

And of his debts, &c.

Payment. And that the said defendant may be decreed to pay to your suppliant the sum which shall be found due to her on foot of the said weekly sum, together with your suppliant's costs in this cause ; and that a sum may be invested out of the assets of the said testator sufficient to secure the future payment of the said weekly sum ; and that your suppliant may have such further and other relief in the premises as to your Lordship shall seem meet, and the circumstances of the case may require.

Investment of a portion of assets to secure future payments.

General relief.

May it please, &c.
Pray subpoena against the defendant, the executor.
 See *Byrne v. Healy*, 2 Mol. 94.

Bill by Legatee and Cestui que Trust to carry into Execution the Trusts of a Will against Executor (who is Devisee of the real Estate), and also against Testator's Heir at Law.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant, John Warren, of, &c., on behalf of himself and all other the legatees of John Brown, late of, &c., deceased, who shall come in and contribute to the expense of this suit.

Testator seised That the said John Brown was, in his life-time, and at the time of making his will, and of his death, seised of a considerable real estate, and particularly of the lands of *Grange*, situate, &c., and was and possessed. also possessed of a very considerable personal estate and fortune,

consisting of divers premises held under leases for terms of years, and other chattels real, monies, bills, bonds, notes, mortgages, judgments, and other securities for money, and various other particulars, to a large amount in value in the whole, and much more than sufficient to pay all his just debts and funeral expenses; and being so seised and possessed, he, the said John Brown, on or about the 1st day of June, 1840, duly made and published his last will and testament in writing, which was executed and attested in such manner as by law is required; and thereby devised and bequeathed his real and personal estates to John Styles, a defendant hereinafter named, upon trust [*state the portion of the will creating a trust for the payments of debts and legacies, and the other material parts of the will*]: and the said testator by his said will appointed the said John Styles executor of his said will, as by the said will, or the probate copy thereof, will more fully appear.

His will.

Executor.

Your suppliant further sheweth, that the said John Brown departed this life on or about the 1st day of January, 1841, without having in any manner revoked or altered his said will, leaving James Brown, one other defendant hereinafter named, his only son and heir at law, him surviving, and thereupon the said John Styles duly proved the said will in the proper Ecclesiastical Court, and took upon himself the burden of the execution thereof, and hath possessed himself of the personal estate and effects of the said John Brown, and of all the title-deeds, evidences, and writings relating to his real estates and chattels real; and has also entered into possession of all the real estates of which the said John Brown died seised or possessed; and hath been, ever since the decease of the said John Brown, and now is in the actual possession of the said real estates, or in the receipt of the rents and profits thereof.

Testator's death.

Probate to executor,

who has taken possession of personal and real estate,

and is now in possession.

Your suppliant further sheweth unto your Lordship, that under and by virtue of the said will and testament of the said John Brown, your suppliant is entitled to a legacy or sum of £500 thereby bequeathed to him, and there is now due and owing to your suppliant, on foot of the said legacy, for principal and interest, the sum of £550; and your suppliant further sheweth, that the trusts of the said will ought to be performed and carried into execution, and that the said John Styles ought to account for the personal estate and effects of the said testator, and for the rents and profits of his real estates;

Plaintiff's title to legacy.

Sum due to plaintiff.

- Applications.** and your suppliant hath frequently applied to the said John Styles for payment of the said legacy, but hitherto without effect.
 And your suppliant further charges that the said James Brown disputes the validity of the said will.
 And now so it is, &c. (*ante*, p. 17).
- Charging part.** And the said John Styles at times pretends, &c. [*insert pretences, as ante*, p. 408].
- General averment.** All which actings, &c. (p. 18).
 To the end, &c. (*ante*, p. 309).
- Interrogating part.** [*Interrogate to the stating and charging parts, and insert the interrogatories as to lands, &c., of which testator died seised, pp. 25, 26, and 27*].
- Prayer.** And that the will of the said John Brown may be established, That trusts of will be executed. and the trusts thereof carried into execution by and under the direction of this honourable Court; and that an account may be taken of what is due and owing to your suppliant, for principal and interest, on foot of the said legacy so bequeathed to your suppliant; and that the said John Styles may be decreed to pay the same to your suppliant, and if the said John Styles shall not admit assets of the said testator sufficient to answer the same, then that an account may be taken of the personal estate and effects of the said testator, and of his debts, legacies, and funeral expenses, and of the rents and profits of his real estates which accrued due since his decease, into whose hands the same have come, and how applied and disposed of, and also an account of the real and freehold estates of the said John Brown, and of all charges and incumbrances affecting the same; and that, if necessary, the real estates and property of the said testator may be sold, and that the produce of such sale, together with the personal estate of the said testator, may be applied in a due course of administration, and that in the mean time a Receiver may be appointed to receive the rents and profits of the said real and freehold estates and chattels real of the said testator; and that all proper and necessary directions may be given for effecting the several purposes aforesaid, and that your suppliants may have such further and other relief in the premises as to your Lordship shall seem meet, and the circumstances of this case may require.
- Account of sum due plaintiff on legacy.**
- Payment.**
- If necessary, account of personal estate, debts, &c.,**
- rents of real estates since death of testator.**
- of real estate ;**
- of all charges ;**
- Sale.**
- Administration of assets.**
- Receiver.**
- General relief.**

Bill for Payment of a Legacy charged by Will on a particular Estate.

To the, &c.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant, John Jones, of, &c., that John Brown, late of, &c., was, in his life-time, and at the time of his death, seised or entitled in fee simple of or to divers messuages, lands, and hereditaments, with the appurtenances thereto belonging, situate at, &c., and, amongst others, of certain lands and tenements known by the name of the *Grange* estate, and, being so seised or entitled, the said John Brown duly made and published his last will and testament in writing, bearing date on or about the 1st day of June, 1840, executed and attested as by law is required, and thereby gave and bequeathed unto your suppliant, by the description of his dear friend John Jones, of, &c., the sum of £500 sterling, which he directed should be exclusively charged upon his, the said testator's, estate of *Grange*, devised to his nephew, William Styles ; and subject and charged with the payment of the said sum of £500, the said testator devised all his messuages, lands, and real estates, at, &c., aforesaid, unto his said nephew, Wm. Styles, his heirs and assigns, for ever : and the said testator directed that his personal estate, and the residue of his real estates, should not be liable for the said legacy ; as in and by the said will, reference being thereunto had, will more fully appear.

Testator seised
in fee of lands,
&c.

Will,

bequeathing to
plaintiff a legacy
of £500, charg-
ed on particular
real estate ex-
clusively,

devised to the
defendant.

Personal estate
not to be liable.

Your suppliant further sheweth unto your Lordship, that the said testator departed this life on or about the 1st day of November, 1841, without issue, and without having revoked, or in anywise altered his said will, leaving the said William Styles, his nephew and heir at law ; and the said William Styles, upon, or soon after the said testator's death, entered into possession of the said several estates, and receipt of the rents and profits thereof respectively, including the said estate of *Grange*, and hath ever since continued, and now is in such possession and receipt.

Testator's
death.

Entry by de-
visee.

Your suppliant further sheweth unto your Lordship, that being under the said will, as your suppliant is advised, entitled to the said legacy of £500, and interest thereon, after the rate of 5 *per cent. per annum*, to be computed from the 1st day of November, 1842,

Applications.

being the expiration of twelve months from the said testator's decease, your suppliant hath, at several times, both by himself and his agents, applied to the said William Styles, and requested him to pay to your suppliant the said legacy, or sum of £500; and your suppliant hoped that the said William Styles would have complied with such requests, as in justice he ought to have done.

Combination.

Pretences :

1. No will.

2. Not duly executed.

3. Lands sold or incumbered.

But now so it is, &c. (*ante*, p. 17, *William Styles, sole defendant*), sometimes pretending that the said John Brown did not make and publish such last will and testament in writing, as aforesaid, or that the same was not duly executed and attested, as by law is required, and that therefore, on the said testator's death, his said estate of *Grange*, amongst others, descended unto him, the said defendant, as heir at law of the said testator, and that the same is not subject to the payment of the said legacy to your suppliant; whereas your suppliant charges the contrary to be the truth. And at other times the said defendant pretends that he hath sold, or agreed to sell the said estate of *Grange*, or that there are or is some mortgages or mortgage, incumbrances or incumbrance thereon, but he refuses to discover the particulars of such sale, agreement, mortgage, or other incumbrance; and the said defendant hath in his possession, custody, or power, the title deeds and writings relating to the said estate of *Grange*, and refuses to produce the same.

All which actings, pretences, and refusals, &c., *ante*, p. 18.

To the end, &c. (*ante*, p. 309).

[*Interrogate fully to the stating and charging parts, and proceed thus*] :

Prayer.
That will may
be established,
and Plaintiff's
legacy declared
a charge.

Account of sum
due ;
payment ;
or in default,
sale.

Account of all
charges.

And that the said will of the said John Brown may be established, and that the said legacy may be declared well charged on the said estate of *Grange*, and that an account may be taken of the sum due to your suppliant on foot thereof; and that the said defendant may be decreed to pay unto your suppliant the sum which shall be found due to your suppliant on foot of the said account; or in default thereof, that the said estate of *Grange*, or a competent part thereof, for payment of your suppliant's demand, may be sold, and that for that purpose an account may be taken of all charges and incumbrances affecting the said estate, and that all proper parties may join in such sale; and that out of the proceeds thereof your suppliant, and all other persons having charges on the said lands of

Grange, may be paid the amount of their said demands, with interest thereon respectively; and that in the meantime a Receiver ^{Receiver.} may be appointed to receive the rents and profits of the said lands of *Grange*, and that all proper and necessary directions may be given for effectuating the purposes aforesaid [*and for further relief, &c.*].

[*Pray subpoena against William Styles (devisee and heir-at-law)*].

In order to exonerate personal estate from payment of debts and legacies, there must be a clear intention appearing on the face of the will, *Lamphier v. Despard*, 2 Dru. & War. 59; S. C. 4 Ir. Eq. R. 334.

Bill by a Legatee and Cestui que Trust, to carry into Execution the Trusts of a Will, seeking to charge the Executor and Trustee with wilful Default, and Interest on Balances.

[*State that the testator was seised and possessed, as ante, p. 412; then state his will, the appointment of defendant as executor and trustee, the death of testator, that the defendant proved the will, and took possession of the testator's property, as ante, p. 413; then state the breaches of trust committed in the administration of the trust fund; that the defendant has retained large balances in his hands, and has applied a considerable part of the assets to his own use, and employed them in his trade, &c. Then proceed to state the plaintiff's title, and the usual applications and refusals, and proceed thus*]:

And to countenance such refusals, the said defendant pretends that there is little or no surplus of the said testator's estate, after payment of his debts, funeral and testamentary expenses, whereas your suppliant charges the contrary, and so it would appear if the said defendant would set forth a full, true, and particular account of his receipts and payments on account of the said testator's estate, and the particulars of the property at present subsisting in *specie*.

And your suppliant further charges that the said defendant has,

or lately had in his possession, custody, or power, divers books, accounts, books of account, letters, copies of letters, and extracts of letters, memoranda and writings relating to the matters hereinbefore mentioned, and that he ought to deliver the same to your suppliant ; but he refuses so to do.

And your suppliant charges that some proper person ought to be appointed Receiver of the rents and profits of the said testator's freehold and leasehold estates.

To the end, therefore, &c., *ante*, p. 309 [*interrogate fully to the stating and charging parts, and add the prayer as follows*] :

Prayer.

That trusts of will be executed.

Account of sum due to plaintiff.

Account of testator's personal estate, debts, &c., and of rents of real estate since his death possessed, or recoverable by defendant.

Account of assets retained by defendant more than a year from testator's death, and of sums subsequently received.

Interest on balances.

Account of real estate, and of incumbrances.

Sale.

Administration

And that the trusts of the will of the said John Brown may be carried into execution by and under the direction of this honourable Court ; and that an account may be taken of what is due and owing to your suppliant on foot of the legacy so bequeathed to your suppliant ; and that the said defendant, John Styles, may be decreed to pay to your suppliant what shall appear to be due to him, at foot of such account, together with your suppliant's costs in this cause. And if the said defendant shall not admit assets of the testator sufficient to answer the same, then that an account may be taken of the personal estate and effects of the said testator, and of his debts, legacies, and funeral expenses ; and of the rents and profits of his real estates which accrued due since his decease, which have come to the hands of the said defendant, or which, but for his wilful default, might have been received by him ; and that an account may be taken of the monies and property of the said testator, which remained in the hands of the said defendant unapplied at the end of twelve months from his death ; and also an account of all sums received by the said defendant, or for his use, subsequently to that time, and how the same have been applied ; and that the said accounts may be taken with half-yearly rests ; and that the said defendant may be charged with interest at the rate of six *per cent.* on the balances which shall appear, from time to time, to have been in his hands, beyond what the purposes of the will of said testator required. And that an account may be taken of the real and freehold estates of the said John Brown, and of all charges and incumbrances affecting the same ; and that the real estates of the said testator may be sold, and that the produce of such sale, together with the personal estate of the said testator, may be applied in a due course of

administration ; and that in the mean time a Receiver may be appointed to receive the rents and profits of the said estates of the said testator ; and that all proper and necessary directions may be given ; and that your suppliant may have such further and other relief in the premises, as to your Lordship shall seem meet, and the circumstances of the case may require. Receiver.

Bill by an Executor, Trustee, and Devisee, under a Will, to carry the Trusts thereof into Execution.

To the, &c.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant, John Jones, of, &c., that John Brown, late of, &c., deceased, at the respective times of making his will, and of his death hereinafter mentioned, was seised or entitled in fee simple of or to divers messuages, lands, tenements, and hereditaments, of considerable yearly value, situate in the counties of Meath and Westmeath respectively, and was also possessed of or entitled to certain leasehold estates, held by him for the residue of certain terms of years, which are still subsisting and unexpired, and was also possessed of a considerable personal estate, consisting of, &c. Testator seised of real and personal estate.

And being so seised, possessed, and entitled, the said John Brown Will. duly made and published his last will and testament in writing, bearing date the 1st day of June, 1840, executed and attested as by law required, and thereby gave, devised, and bequeathed unto your suppliant, all, &c. [*State will, devising to plaintiff all his estate, real and personal, upon trust for payment of debts and legacies, out of the rents of real estate, in the event of personalty proving insufficient. If personalty more than sufficient for payment of debts and legacies, surplus to go to testator's nephew, William Brown. As to real estate, subject, as aforesaid, to plaintiff in fee: plaintiff sole executor*]. As by the said will, or the probate copy thereof, reference being thereto had, will more fully and at large appear.

Death. Your suppliant further sheweth, that the said John Brown departed this life on or about the 1st day of January, 1844, without having revoked or altered his said will, leaving Thomas Brown, a defendant hereinafter named, his only son and heir at law, him surviving.

Thomas Brown,
heir.

Probate. Your suppliant further sheweth, that shortly after the death of the said John Brown, your suppliant duly proved his said will in the proper Ecclesiastical Court, and took upon himself the execution thereof, and your suppliant is desirous of applying the said testator's personal estate and effects in payment of the said testator's debts, and of his legacies now remaining unpaid, so far as the same will extend, and of paying the remainder thereof, if the said personal estate should prove deficient, out of the rents and profits of the said real estates, and if there should be any surplus of said personal estate, after payment of said debts and legacies, of paying such surplus to the said William Brown, pursuant to the trusts of said will, as in justice and Equity your suppliant is bound to do.

Combination. But now so it is, may it please your Lordship, that the said Thomas Brown and William Brown, in concert with each other, make various objections to your suppliant's applying the said personal estate, and the rents and profits of the said real estate, according to the directions of the said will.

Pretences. And the said Thomas Brown alleges and pretends that the said will was not duly executed, as by law required, and that the said testator was not of sound and disposing mind, memory, and understanding, at the time when he executed said will.

1. Will not
duly executed.
2. Testator of
unsound mind.

Whereas your suppliant charges the contrary of such pretences to be true, and that the said will was duly executed and attested in the presence of two subscribing witnesses, who duly attested the execution thereof, in the presence of the said testator, and that the said testator was of sound and disposing mind, memory, and understanding, at the time of the execution thereof.

3. That personal estate is exempt from payment of legacies. And the said William Brown sometimes pretends, that the personal estate of the said testator is not subject to the payment of the several legacies given and bequeathed by the will of the said testator, but is exempt therefrom, and that all the said legacies ought to be paid out of the rents and profits of the said testator's real estates.

Whereas your suppliant charges the contrary of such pretences to be true, and that the said personal estate is applicable to the payment of all the said testator's legacies, after satisfying his funeral expenses and debts.

And your suppliant, under the circumstances aforesaid, is unable to administer the said personal estate and to execute the trusts of said will, without the directions of this honourable Court.

And the said William Brown is desirous of having a person appointed by this Court, to receive the rents and profits of the said real estates, devised to your suppliant as aforesaid, to which your suppliant has no objection.

In consideration whereof, and forasmuch as your suppliant can only have adequate relief in the premises, in a Court of Equity, where matters of this nature are properly cognizable and relievable.

General averment.

To the end, therefore, &c., *ante*, p. 309. [*Interrogate to the stating and charging parts, and proceed thus*] :

Interrogating part.

And that the said will may be established, and the trusts thereof may be performed and carried into execution, by and under the direction of this honourable Court ;

Prayer.

That will be established.

And that an account may be taken of the said testator's personal estate and effects, and of his funeral expenses and debts, and of the legacies bequeathed by the said will, your suppliant being ready and hereby offering to account for all such parts of the said personal estate as have been possessed by him ;

Account of personal estate, funeral expenses, debts and legacies.

And that the said personal estate may be applied in payment of the said funeral expenses, debts, and legacies, in a due course of administration ;

Administration.

And that the clear residue (if any) of the said personal estate, may be ascertained and paid to the said defendant, William Brown.

Payment of surplus of personal estate, if any, to residuary legatee.

And in case it shall appear, that the said personal estate is not sufficient for payment of all the said funeral expenses, debts, and legacies, or that any parts thereof are not payable out of such personal estate, then that proper directions may be given for payment of such deficiency, or of such parts thereof as are not payable out of the said personal estate, out of the rents and profits of the said real estates devised to your suppliant, according to the trusts of said will.

If personal estate deficient, payment of deficiency out of rents of real estate.

Receiver.

And that, if necessary, a proper person may be appointed by this honourable Court, to receive the rents and profits of the said real estates, devised as aforesaid [*and for further relief*]. May it please, &c.

[*Prays subpoena against Thomas Brown (heir-at-law), and William Brown (residuary legatee of personalty)*].

Bill by Executors for Execution of the Trusts of Will of real and personal Property, of which the Residue was given to Trustees for charitable Uses.

In Chancery.

Humbly complaining, shew unto your Lordship, your suppliants, George Tuthill, of, &c., and John Scott, of, &c., executors of the last will and testament of Hannah Villiers, widow, deceased.

Testatrix seized

That the said Hannah Villiers was, in her life-time, and at the time of making and publishing of the will and codicil hereinafter mentioned, and at the time of her death, seized of the real estate, and possessed of the personal estate and fortune hereinafter next mentioned, that is to say, she was seized in fee simple of the lands

and possessed.

of, &c., and possessed of a considerable personal estate and fortune, consisting of government stock, &c., to a very considerable amount in the whole; and being so seized and possessed, she, the said Hannah Villiers, on or about the 3rd day of August, 1819, duly made and published her last will and testament, in writing, executed and attested as then by law required to pass real and freehold estates by devise, and thereby devised certain of her said estates, that is to say,

Her will,

devising *Whitechurch*.

the lands of *Whitechurch*, situate in the County of Tipperary, unto your suppliants, for the term of 500 years from her decease, upon trust, by sale or mortgage thereof, to raise the sum of £1500, with interest at the rate of £5 *per cent. per annum* from her death; and subject to the said term and the trusts thereof, she devised the said lands of *Whitechurch* unto Benjamin Lucas, of, &c., and his heirs and assigns for ever. And as to, for, and concerning the said sum of £1500, the said testatrix by her said will directed that your sup-

to Benjamin
Lucas,
charged with
£1500,

pliants should pay the sum of £1000 part thereof, and interest thereon, unto and amongst such of the children of the Rev. Dr. Adamson, late of, &c., deceased, as should be living at her death, equally to be divided amongst them, and that your suppliants should pay the sum of £500, the residue of said sum of £1500, with interest thereon from her death, unto such person or persons, being related to said testatrix's deceased grandmother, and in such parts, shares, and proportions, if more than one, and in such manner and form, as your suppliants should think proper.

of which £1000 was for the children of Dr. Adamson, living at her death,

and £500 for the relatives of her grandmother,

Your suppliants further shew, that there were living at the time of the said testatrix's death, three children of the said Rev. Doctor Adamson, and no more, that is to say, James Adamson, William Adamson, and the Rev. Arthur Adamson, all of whom are still living, and have attained the age of twenty-one years.

Your suppliants further shew, that the said testatrix had had two grandmothers, both of whom had died long before the date of said will, that is to say, her *paternal* grandmother and her *maternal* grandmother, neither of said grandmothers being related to the other of them, but the said testatrix did not by her said will specify or describe that particular grandmother, whether of the paternal or maternal side, to whose relatives she wished the said sum of £500 to be paid.

without specifying whether paternal or maternal grandmother.

Your suppliants further shew, that the paternal grandmother of said testatrix was A. B., and was the wife of Richard Scott, the paternal grandfather of said testatrix, and the said A. B. died many years ago, having survived her said husband, and having also survived the maternal grandmother of said testatrix, and therefore the relatives of said paternal grandmother insist that, on the true construction of said will, the said sum of £500 is divisible amongst them, in exclusion of the said relatives of said maternal grandmother.

Claim of relatives of paternal grandmother.

Your suppliants further shew, that the maternal grandmother of said testatrix was C. D., and was the wife of Christopher Tuthill, the maternal grandfather of the said testatrix, and the relatives of said maternal grandmother insist that the said testatrix meant and intended, and had often so expressed herself, that the said sum of £500 and interest, should be distributed among the relatives of her said maternal grandmother, in exclusion of the relatives of her said paternal grandmother, and as evidence of such intention they insist,

Claim of relatives of maternal grandmother.

as the fact and truth is, that the said testatrix, by a former will by her made, bearing date the 1st day of May, 1792, and now in your suppliants' possession, bequeathed said sum of £500 to the relatives of her maternal grandmother, as by said will may appear.

Doubt as to whether plaintiff's power of selection extends to relatives not next of kin.

Your suppliants further shew, that it is a matter of doubt whether the discretionary power by said will given to your suppliants, of selecting the relatives to be benefited by said bequest, is confined to such relatives as are next of kin of that particular grandmother referred to by the said testatrix in her will, or whether it extends to more remote relations.

Plaintiffs desire direction of Court.

And your suppliants shew, that your suppliants are not competent to decide upon such questions, and are anxious to have the direction of this honourable Court as to said several matters, and to act thereunder.

Plaintiffs know not who are the relatives of grandmothers.

Your suppliants further shew, that the defendant Bindon Scott, claims to be a relative of the paternal grandmother of said testatrix, and the defendant, Anne Minnett, claims to be a relative of the maternal grandmother of said testatrix, but your suppliants are unable to state whether their claims are founded in fact, your suppliants being wholly ignorant as to who are or is the relatives or any relative of said testatrix's grandmothers.

Will resumed.

£22 15s. per annum for Presbyterian minister of Limerick,

charged on lands

devised to plaintiff Geo. Tuthill.

To said trustees

Your suppliants further shew, that the said testatrix, by her said will, devised to John Duddell and John Pinkerton, two of the defendants hereinafter named, and to their heirs, an annuity or yearly rent-charge of £22 15s., upon trust for the said John Pinkerton during his life, if he should so long continue to be the Presbyterian minister of the city of Limerick, and after his decease, or previously ceasing to be or act as minister, as aforesaid, in trust for ever thereafter, for the Presbyterian minister of the said city; and the said testatrix by her said will directed that said annuity should be charged and chargeable upon the said testatrix's lands of *Kilbready*, in the County of Limerick, to be paid as therein mentioned; and subject to said annuity, and the powers by said will given for recovering the same, the said testatrix thereby gave and devised her said lands of *Kilbready* aforesaid, with the appurtenances, to the use of your suppliant, George Tuthill, and his heirs for ever.

And the said testatrix, by her said will, gave and devised unto the said John Duddell and John Pinkerton, their heirs and assigns,

an annuity or yearly rent-charge of £340, upon the trusts hereinafter mentioned, issuing out of and charged upon the lands of *Greenacre*, in the County of Clare, payable as therein mentioned; and subject to said annuity, and the powers and remedies by said will given for recovery thereof, the said testatrix thereby gave and devised said lands unto your suppliant John Scott, his heirs and assigns, for ever.

£340 per annum,
charged on
lands

devised to
plaintiff, John
Scott.

And the said testatrix bequeathed unto each of them the said John Duddell and John Pinkerton, and to the trustees for the time being succeeding to them respectively, the clear yearly sum of £40, as a recompense for their care and trouble in the execution of the trusts thereby created, payable as therein.

To said trustees
£40 per
annum, each.

And the said testatrix, by her said will, bequeathed the sum of £500 to the said Bindon Scott, and the sum of £100 to a certain institution or society in Limerick, called "The Jubilee Charitable Loan;" and the sum of £50 for "the poor roomkeepers of Limerick," in such shares as her trustees therein named should think proper and select; and the sum of £100 to be invested in the Government funds, the interest or dividends thereof to be applied towards the relief of "debtors confined for small debts," and the yearly sum of £10 to her said trustees, John Duddell and John Pinkerton, in trust for "the Protestant Female Orphan School of Limerick."

£500 to Bindon Scott.
Several charitable legacies.

And the said testatrix, by her said will, devised to the said John Duddell and John Pinkerton, their heirs and assigns, a piece of land in the city of Limerick, which she had purchased from Lord Glentworth, in trust for the purpose of having alms-houses erected and built upon the same, for the reception and habitation of "twelve widows," as therein mentioned.

A piece of
land to her
trustees,

to have alms-
houses built
for twelve
widows.

And the said testatrix, by her said will, gave, devised, and bequeathed unto the said John Duddell and John Pinkerton, their heirs, executors, and administrators, all the residue of her real and personal estate, upon trust to sell the residue of her said real estates, and to stand possessed of the produce thereof, and of the residue of her personal estate, upon trust to invest in the funds a competent sum to produce by the dividends or annual produce thereof the yearly sum of £80, and to appropriate the same as a fund for payment of the said two annuities of £40 and £40, so as aforesaid be-

Residue of real
and personal
estate to said
trustees,
to sell said
real estates,
and to invest
sufficient to

produce a fund for payment of said £40 and £40 *per annum*, and to build, furnish, and support the alms-houses.

Out of said £340 *per annum*, her trustees to pay £24 each, to twelve widows.

Surplus of said £340 *per annum*,

and residue of real and personal estate, "for such charitable purposes" as trustees should direct.

Death of testatrix :

her next of kin: heir-at-law.

Plaintiffs proved in England and Ireland,

and possessed themselves of her property, and have paid large sums as executors.

The heir, and next of kin insist the chari-

queathed to her trustees for the time being, and a competent sum to produce by the dividends or annual produce thereof the said yearly sum of £10, so as aforesaid bequeathed in trust for "the Protestant Female Orphan School," and also in trust to lay out and expend a competent sum in building and completing alms-houses, for the reception and habitations of the said "twelve poor widows," and in furnishing and supporting the said alms-houses, when built; and the said testatrix, by her said will, directed, that the said alms-houses should be occupied by such twelve poor widows as her trustees should appoint; and the said testatrix, by her said will, directed her said trustees, the said John Duddell and John Pinkerton, their heirs and assigns, out of the said yearly rent, or annual sum of £340, to pay to each of the said twelve poor widows the sum of £24 sterling; and the said testatrix, by her said will, directed that her said trustees should stand possessed of the surplus of said yearly rent, or annual sum of £340, and of the surplus of the monies to be produced from the sale of the said testatrix's residuary real estate, and of the residue of her personal estate, for "such charitable trusts, ends, and purposes," as the said John Duddell and John Pinkerton, or the trustees for the time being, acting in their respective places, in execution of the trusts of her said will, should, in their discretion, think proper; and the said testatrix, by her said will, appointed your suppliants executors thereof, as by the said will, and the probate copy thereof, will appear.

Your suppliants further shew, that the said testatrix died on the 14th day of January, 1821, without having altered or revoked her said will, leaving Anne Minnett, widow, her only next of kin, and leaving the said defendant Bindon Scott, her heir-at-law.

And your suppliants duly proved the said will of the said testatrix, in Her Majesty's Court of Canterbury, in England, being the proper Ecclesiastical Court in that country, and also in Her Majesty's Court of Prerogative in Ireland, and your suppliants have possessed themselves of such parts of the property of the said testatrix as your suppliants could get into their possession or power; and your suppliants have expended large sums for the necessary purposes of their said executorship.

Your suppliants further shew, that the said Anne Minnett and Bindon Scott insist that the bequests in said will contained to cha-

ritable uses, are altogether vague and uncertain, and not such as are warranted by the laws and Statutes of these realms, and that the said testatrix is to be considered as having died intestate as to the same, and that the personal estate so bequeathed properly belongs to the said Anne Minnett, as the next of kin of said testatrix, and that the real and freehold property, devised for such purposes, descended upon and properly belongs to the said Bindon Scott, as heir-at-law of said testatrix; and the said Bindon Scott sometimes insists, that the will of said testatrix was not duly executed and attested to pass real estate, and that he is not disinherited thereby; and the Commissioners of Charitable Donations and Bequests claim an interest in the assets of said testatrix, so far as relates to the charitable institutions created by said will, and the charitable donations thereby bequeathed; and under the circumstances herein stated, and considering the nature of the said bequests to public, charitable, or pious uses, and the duration and extent thereof, and the amount in value of the property bequeathed, your suppliants are anxious to have the direction and assistance of this honourable Court, in the application of the assets and funds which have come, or shall come, to their hands, and that the rights of all parties thereto may be adjusted and declared by a Court of Equity.

table bequests
are void,

and the heir
insists the
will was not
duly attested.

Plaintiffs are
desirous to act
under the
Court's direc-
tion.

Your suppliants further shew, that the Right Honourable T. B. C. Smith, Her Majesty's Attorney-General, claims to be interested, in right of Her Majesty, in the funds by said will bequeathed, for "public, charitable, and pious uses."

And now so it is, &c., *ante*, p. 17.

To the end, therefore, &c., *ante*, p. 309.

Combination.

Interrogating
part.

1. Whether the said Hannah Villiers was not, in her life-time, and at the time of her death, seised and possessed of the several and respective properties, estates, and effects, hereinbefore in that behalf stated, or how otherwise?

2. Whether the said testatrix did not make such will, of such date as hereinbefore in that behalf stated, or in what respects or particulars, respect or particular, does your suppliants' statement of said will, as hereinbefore made, differ or vary from the true statement or import of said will, and whether the said will was not duly signed and attested by the said testatrix, and whether the said testatrix was not, at the time of making her said will, of sound and disposing mind and memory, or how otherwise?

3. Whether the said testatrix did not depart this life, as hereinbefore stated, without having altered or revoked her said will, leaving the persons hereinbefore named, her heir-at-law, and next of kin, or how otherwise?

4. Whether your suppliants have not obtained probate of said will forth of the proper Ecclesiastical Courts, or how otherwise?

5. Whether the said defendants claim to have, or be entitled unto any and what estates or interests under the said will, or under the said Hannah Villiers, in all and singular, or any and what parts or part of said several properties which the said Hannah Villiers died possessed of, or entitled unto?

Prayer.

Will declared to be proved; trusts to be executed; account of real and personal estate,

of debts, &c., that assets may be administered; that £1500 may be declared a charge on *Whitechurch*, and be raised; account of sums due, and of persons entitled to £1000 and £500 legacies.

Special inquiry as to £500,

And that the will of the said Hannah Villiers may be declared to be well proved, and that the trusts thereof may be carried into execution, under the direction of this honourable Court.

And, accordingly, that an account may be taken of the real, freehold, and personal estates of the said testatrix, at the time of her decease, into whose hands the same have come, and how the same have been applied and disposed of; and also an account of her debts, legacies, and funeral and testamentary expenses; and that the assets of said testatrix may be applied in a due course of administration; and that the said sum of £1500, with interest thereon, may be decreed to be well charged on the said lands of *Whitechurch*, and that the same may be raised in such manner as your Lordship shall direct; and that an account may be taken of the sum due on foot of the said sum of £1000, part of said charge of £1500 in said will mentioned, and of the persons entitled thereto; and also an account of the sum due on foot of the said sum of £500, the residue of said charge of £1500, and of the persons entitled thereto; and that the rights of all parties, entitled to or interested in said sums of £1000 and £500 respectively, may be declared and adjudicated; and more especially, that it may be referred to one of the Masters of this honourable Court, to make such inquiries touching the relatives^(a) of the said testatrix's grandmother, as your Lordship shall think

(a) Gifts to relations, or to near relatives, are confined to those who take under the Statute of Distributions, 19 Ves. p. 403; but gift to nearest relative is confined to next of kin properly so called, see 10 Jar. Byth. 197-8. (2nd ed.)

necessary, for the purpose of ascertaining what persons are entitled to the benefit of the said bequest of £500, your suppliants waiving any right or privilege of exercising any discretion whatever with respect to the said sum of £500, and the disposition thereof.

plaintiffs waiv-
ing discretion-
ary power.

And that the rights of all parties in and to the several properties by said will devised and bequeathed for public, charitable, or pious uses, may be declared and adjudicated, and that such inquiries and accounts, touching said charitable bequests, may be directed, as your Lordship shall think proper, your suppliants being ready and willing to bring in the funds, assets, and effects of the said testatrix, in their hands or power, which are applicable to such public, charitable, or pious uses; and that a Receiver may be appointed, pending this cause, to receive the rents and profits of such parts of the said testatrix's real, freehold, or leasehold interests, as by said will were devised or bequeathed for said public, charitable, or pious uses; and that all parties having any title-deeds relating to the premises devised or bequeathed to such public, charitable, or pious uses, may be obliged to bring in and lodge the same; and that all proper accounts may be taken, and that all necessary directions may be given for the purpose of effecting and carrying into execution the will and intentions of the said testatrix, so far as the same may be agreeable to the rules of Law and Equity; and that your suppliants may have such further and other relief in the premises, as suits the nature, merits, and circumstances of your suppliants' case, and as may be agreeable to Equity and good conscience.

Declaration of
rights of par-
ties as to prop-
erty given in
charity.

Plaintiffs offer
to bring in
funds given in
charity.

Receiver.

Title-deeds.

General relief.

May it please, &c.

Defendants,

Bindon Scott [*heir-at-law of testatrix*].

Anne Minnett [*next of kin of ditto*].

Benjamin Lucas [*devisee*].

John Duddell

John Pinkerton } [*trustees in the will of testatrix*].

[*And pray that the Commissioners of Charitable Donations, and the Attorney-General, on being served with notice, pursuant to the 15th General Rule, may be bound, as ante, p. 310*].

Bill by a Son and Heir at Law, against the Devisees under his Father's Will, for Production of the Title-Deeds, upon the Assumption that Plaintiff was entitled under a Settlement to the Estates devised, and for an Issue to try the Validity of the Will.

In Chancery.

To the, &c.

Humbly complaining sheweth unto your Lordship, your suppliant, John Jones, of, &c., the eldest son and heir at law of Maurice Jones, late of, &c., deceased.

Plaintiff's pedigree.

That the said Maurice Jones was the eldest or only son and heir at law of Owen Jones, deceased, who died on or about the 1st day of June, 1815, who was the eldest or only son and heir-at-law of Peter Jones, deceased, who died on or about the 1st day of May, 1805.

Lands, &c., limited to plaintiff's ancestor

Your suppliant further sheweth unto your Lordship, that by some deed or deeds, will or wills, or other writing or writings duly made and executed by your suppliant's ancestors, divers manors, messuages, lands, tenements, and hereditaments, of considerable yearly value in the whole, situate, lying, and being at, &c., or at some or one of those places, in the County of Meath, were limited, settled, and assured, or agreed to be limited, settled, and assured to, for, or upon particular uses, trusts, intents, and purposes, under which the said Maurice Jones, Owen Jones, or Peter Jones, or some or one of them, and particularly your suppliant's said late father, were or was entitled thereto for his life, with remainder to his first and other sons in tail, or tail male, or to the heirs of his body, as in and by such deeds, wills, or writings, or some copies or extracts thereof, now in the custody or power of the defendants hereinafter named, or of some or one of them, when produced, will more fully appear.

for life, with remainder to first and other sons in tail.

Plaintiff's father in possession as tenant for life only, until his death;

Your suppliant further sheweth unto your Lordship, that accordingly your suppliant's said father was for some time before, and at the time of his death, in possession of the said manors, messuages, lands, tenements, and hereditaments, as tenant for life thereof, under or by virtue of such deed or deeds, will or wills, or other writing or writings.

whereupon plaintiff became entitled.

And on his death, which happened on the 4th day of April, 1842, your suppliant became entitled to all the said manors, messuages,

lands, tenements, and hereditaments, as tenant in tail general, or tail male, or otherwise, and your suppliant ought accordingly thereupon to have had possession thereof, and of all the title-deeds and writings relating thereto, all which were in the custody or power of your suppliant's said father at the time of his death. But your suppliant sheweth, that soon after the death of your suppliant's said father, John Styles, James Styles, and William Styles, or some or one of them, got into possession of all or of the greatest part of the said manors, &c., and have or hath ever since been, and now are or is in possession thereof.

Possession of lands, &c., taken by defendants,

and retained ;

And they, or some or one of them, have or hath got into their or his custody or possession all the deeds or writings relating to the said manors, &c., and the same now are in the custody or possession of them, or of some or one of them.

and of title-deeds.

Your suppliant further sheweth unto your Lordship, that he hath applied to the said John Styles, James Styles, and William Styles, and requested them to produce to your suppliant all the deeds or writings in their respective custody or power, relating to any of the real estates late of your suppliant's said grandfather, in order that the same might be inspected by proper persons on behalf of your suppliant, so that your suppliant may be able therefrom to discover the particular estates to which he is entitled as aforesaid.

Applications.

And your suppliant hoped that the said John Styles, James Styles, and William Styles would have complied with his said request, as in justice and equity they ought to have done.

But now so it is, may it please your Lordship, that the said John Styles, James Styles, and William Styles combining, &c. (*ante*, p. 17).

Combination.

And the said defendants pretend that no settlement whatever was ever made by any ancestor of your suppliant of all or any of the estates late of your suppliant's said father, by any deed, will, or other writing whatever, and that no such deed, will, or other writing, or any copy or extract thereof, is now or ever was in the custody or power of the said defendants, or of any of them ; or if such settlement ever was made, that all the limitations were, long before the death of your suppliant's said father, barred by some fine or fines, recovery or recoveries, levied or suffered by some person or persons who were or was entitled to the said estates as tenant or tenants in

Pretences.

No settlement ever made, or, if made,

same barred by fine, &c. ;

tail, under such settlements or settlement, or by some deed or deeds executed under and in pursuance of the provisions of the Statute made and passed in the fourth and fifth years of the reign of his late Majesty King William the Fourth, entitled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance in Ireland."

and that plaintiff's father was seised in fee and devised to defendants.

And the said defendants pretend that your suppliant's said father was seised of or entitled to all his said estates in fee simple, and that he by his will and testament in writing, or some codicil or codicils thereto, devised such estates unto and to the use of, or in trust for them, the said defendants, or some or one of them, and therefore that they, or some or one of them, now are or is entitled absolutely to the whole, and that your suppliant hath not, nor ever had, any right or title thereto, or to any part thereof, or to any rents or profits thereof, or of any part thereof, become due since the death of your suppliant's said father.

Whereas your suppliant expressly charges the contrary, and that some deed or deeds, will or wills, or other writing or writings whereby some such settlement as aforesaid, or some other settlement, was made of all or of some of the estates of your suppliant's said father, or some counterparts or counterpart, duplicates or duplicate, copies or copy, abstracts or abstract, extracts or extract of some such deeds or deed, wills or will, or other writings or writing, now are or is, or lately were or was in the custody or power of the said defendants, or of some or one of them, and so it would appear if they would, as they ought to do, produce all the deeds and writings in their respective custody or power, relating to such estates and every part thereof.

Charge ;
entail not
barred.

And your suppliant further charges, that no fine hath been ever duly levied, nor hath any recovery been ever duly suffered of the said estates, or any part thereof, nor any deed executed under the provisions of the said Act for the abolition of fines and recoveries, since the making of such settlement thereof respectively, or at least not by any person who, at the time of levying and suffering thereof respectively, or of executing such deed pursuant to the said Statute, was tenant in tail of the estates therein respectively comprised, and that there was not a good and sufficient tenant of the freehold of the estate comprised in such recovery (if any), at the time of suffering thereof, it being at such time vested in the widow and executrix of

your suppliant's said late great-grandfather, or some other person, as tenant for life, who did not join in making a tenant for suffering such recovery, or otherwise a new settlement was made of such estates or of part thereof, by the deed or deeds executed for declaring the uses of such fine or fines, recovery or recoveries, or by some other deeds or deed, wills or will, or other writings or writing subsequent thereto, under which your suppliant is entitled to the said estates, or to a part thereof; and so it would appear by the deeds or writings relating to the said estates, in the custody or power of the said defendants, or of one of them, if the same were produced.

And your suppliant further charges, that your suppliant's father did not make any last will and testament, or codicil in writing, whereby he devised his real estates, or any part thereof, to any person other than your suppliant, or, if he did, that he was not of sound mind, memory, or understanding at the time of the execution thereof, or that the same was not executed so as to pass real estate, or that the same was obtained by fraud, imposition, or over persuasion, or other underhand means, and therefore no such will or codicil ought to have any effect upon such estates, or any part thereof, but your suppliant, as heir-at-law of his said father, became entitled, on his death, to all his said real estates, or to such parts thereof as he is not entitled unto under such settlement as aforesaid.

Charge ;
no valid will
by plaintiff's
father.

But, nevertheless, the said defendants persist in their claim to the said estates, under some will or codicil of your suppliant's late father, and although often applied to on behalf of your suppliant, refuse to deliver up the possession of the said estates, or of any part thereof, or to account with your suppliant for the rents and profits thereof, or of any part thereof, or to deliver to your suppliant any of the title-deeds or writings relating thereto, or to any part thereof, or even to produce or shew the same to your suppliant, or any person on his behalf.

And your suppliant charges that there are or is some old terms or term of years, mortgages or mortgage, or other incumbrances or incumbrance upon or affecting the said estates, or some part thereof prior to the derivation of your suppliant's right thereto, and that the said defendants will set up such terms or term, mortgages or mortgage, incumbrances or incumbrance, in bar to your suppliant, if he shall proceed at law for recovering possession of the said estates, or of any part thereof, or for any satisfaction for the rents or profits

Charge ;
plaintiff cannot
proceed at law
by reason of
outstanding es-
tates,

for want of
title-deeds, &c.

thereof. And your suppliant is also prevented from proceeding at law for want of a discovery of the instruments which constitute your suppliant's title, and for want of possession thereof.

And the said defendants at other times claim some other right to the said estate, but refuse to discover to your suppliant the nature of such right, or how they make out same.

General aver-
ment.

All which, &c., *ante*, p. 18.

Interrogating
part.

To the end, &c., *ante*, p. 309.

[*Interrogate to the statements and charges, and proceed thus*]:

Prayer.

Production of
title-deeds

for inspection.

Possession of
lands, &c.,

and of title-
deeds, may be
given to plain-
tiff.

Account of
rents since
death of plain-
tiff's father.

Issue.

General relief.

And that the said defendants may produce to your suppliant's agents all the deeds and writings in their respective custody or power, relating to the real estates of your suppliant's said father, or to any part thereof, so that your suppliant may have an opportunity of procuring the same to be inspected and perused by proper persons on his behalf; and that possession of the said estates, or of such parts thereof as shall appear to belong to your suppliant under any deed or deeds, will or wills, writing or writings executed by any of his ancestors, may be delivered to him; and that all title-deeds and writings relating thereto may be delivered to your suppliant; and that the said defendants, or such of them as are in possession of the said estates, may account with your suppliant, and make him satisfaction for the rents and profits thereof, become due since the death of your suppliant's father, and received by them respectively, or by their respective order, or for their respective use; and if it shall appear that your suppliant's said father was, at the time of his death, seised or entitled of or to his real estates, or any part thereof, in fee simple, or had power to dispose thereof by will, then that an issue or issues at law may be directed to try the validity of the said pretended will and codicil; and if the said will and codicil shall be thereupon found to be invalid, then that possession of the said estates may be delivered to your suppliant, and that all the title-deeds and writings relating thereto may be delivered to your suppliant, and that the said defendants, or such of them as shall be bound so to do, may account with your suppliant, and make him satisfaction for the rents and profits of the said estates, become due since the death of your suppliant's said father, and received by them respectively, or by their respective order, or for their respective use; and that your suppliant may have such further and other relief in the premises as

to your Lordship shall seem meet, and the circumstances of this case may require. May it please, &c.

[*Pray subpoena against John Styles, James Styles, and William Styles (devisees), sole defendants*].

Bill by Executor to ascertain the Rights of several Claimants to the Residue of the personal Estate of the Testator, and in what Proportions it is to be distributed among them.

To the, &c.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant, John Jones, of, &c.

That William Jones, late of, &c., deceased, the brother of your suppliant, being possessed of a very considerable personal estate, and being of sound mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the 1st day of May, 1840, executed and attested as by law required, and thereby, after giving divers pecuniary legacies, he gave and bequeathed the residue of his property in the words following, that is to say, “the remainder and residue of my estate and effects, of what nature and kind soever, which I shall at my decease be seised, possessed of, or entitled unto, I give to my next of kin, or heir-at-law;” and the said testator appointed your suppliant executor of his said will; as in and by the said will, or the probate copy thereof, now in the possession of your suppliant, and ready to be produced, reference being thereto had, will more fully appear.

William Jones
possessed of
large personal
estate.

Will,
bequeathing
residue, after
payment of
debts,

to next of kin,
or heir-at-law;
plaintiff exe-
cutor.

Your suppliant further sheweth unto your Lordship, that the said testator departed this life on or about the 1st day of June, 1840, without having altered or revoked his said will, leaving William Heir, Thompson, of, &c., his nephew, and heir-at-law, and the said William Thompson, John Thompson, of, &c., and James Thompson, of, &c., his nephews, and next of kin, him surviving.

Testator's
death.

Heir,

and next of kin.

Probate.

Your suppliant further sheweth, that upon the death of the said testator, your suppliant proved the said will in the proper Ecclesiastical Court, and by virtue thereof possessed himself of all the personal estate and effects of the said testator, to a considerable amount, and more than sufficient to pay all his just debts, legacies, and funeral expenses.

Your suppliant further sheweth, that the personal estate and effects of which the said testator died possessed as aforesaid, and which came to the hands of your suppliant, consisted of, &c.

Your suppliant further sheweth, that he hath, out of the assets of the said testator, so come to his hands as aforesaid, satisfied and discharged all the debts of the said testator which have come to the knowledge of your suppliant, and his funeral and testamentary expenses, and some of the legacies given by his will; and your suppliant is willing and desirous to pay the rest of the said legacies, given by the said will of the said testator, and to pay or distribute the residue of the said personal estate, to and amongst such person or persons as shall appear to be entitled thereto.

Conflicting
claims to re-
sidue by heir
and next of kin.

But now so it is, may it please your Lordship, that the said William Thompson claims to be alone entitled, as answering the description of the heir-at-law of the said testator, contained in the said will, to the residue of his personal estate, and the said John Thompson and James Thompson claim to be entitled as two of the next of kin of the said testator, to respective shares of the personal estate of the said testator, under the description of his next of kin; and your suppliant, who is willing and desirous to pay the residue of the personal estate of the said testator, to such person or persons as is or are entitled to receive the same, does not know to whom he ought to pay the same, and is advised that he cannot act safely herein without the direction of this honourable Court; and your suppliant charges, that if the residue of the personal estate of the said testator is, according to the true construction of the said will of the said testator, to be distributed amongst his next of kin, the same ought to be distributed amongst them in such shares and proportions as they would have been entitled unto, according to the Statute of Distributions, if the said William Jones had died intestate.

To the end, therefore, &c., *ante*, p. 309.

[*Interrogate to the statements and charges, and proceed thus*] :

And that upon a full discovery of the several matters and things aforesaid, it may be ascertained by the decree of this honourable Court, who is entitled, and in what shares and proportions respectively, to the residue of the personal estate of the said testator, after payment of his debts, funeral expenses, and legacies, your suppliant being ready and willing, and hereby submitting to account with the said defendants for all the personal estate and effects of the said testator, which have come to his hands, or to the hands of any person or persons by his order, or for his use, and to apply the same, in a due course of administration, in payment of the debts, if any such still remain unpaid, and of the legacies of the said testator; and to pay the residue of the said personal estate unto and amongst such person or persons, and in such shares and proportions as this honourable Court shall direct; and that all proper and necessary accounts may be directed and taken, and, in particular, an account of the personal estate of said testator, and of his debts, legacies, and funeral and testamentary expenses, and that the clear residue may be ascertained [*and for further relief*]. May it please, &c.

Prayer.

That it may be ascertained who is entitled to residue, and in what shares. Offer to account for sums received, and to pay residue to persons entitled.

Account of testator's personal estate, debts, &c.

[*Pray subpoena against heir-at-law, and next of kin, sole defendants*].

Bill against the Heir by the Devisee to prove the Will.

To the, &c.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant, John Warren, of, &c., the devisee named in the last will and testament of John Brown, late of, &c., deceased.

That the said John Brown being, at the respective times of making his will, hereinafter set forth, and of his death, seised in fee simple of considerable real estate, and being of sound mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the 1st day of May, 1830, which was executed and attested as was then by law required to pass real es-

Will of testator.

tates, and which was in the words and figures following, that is to say [*set forth the will verbatim*], as in and by the said will, when produced to this honourable Court, reference being thereto had, will appear.

His death.

Your suppliant further sheweth unto your Lordship, that the said testator afterwards departed this life on or about the 1st day of May, 1838, without having altered or in any manner revoked his said will, leaving James Brown, his nephew, and heir-at-law, a defendant hereinafter named, him surviving.

And your suppliant well hoped that the said James Brown would not have disputed the said will made by the said testator, or his power in so doing.

But now so it is, &c., *ante*, p. 17.

Pretences.

1. No will.

2. No will duly executed.

3. Testator of unsound mind.

4. Or had no power to devise.

Charge the contrary.

And the said defendant sometimes pretends, that the said testator did not make and publish such will, of such date, and of such purport and effect as is hereinbefore set forth; or if he did, that the same was not so made, executed, and attested as the law then required, in the case of a will for passing real estate; or, if so, that the said testator was not of sound and disposing mind, memory, and understanding, at the time of making such will; or that he had not power to devise the same in the manner he has done in and by his said will; whereas your suppliant charges, as the said James Brown well knows the truth to be, that the said testator was of sound and disposing mind, memory, and understanding, at the time of making such will^(a), and had good and absolute power to make such disposition and devise as he has made thereby, and that he did make and publish his said will in such manner and form as the law then required in case of devises of real estates, and therefore the said James Brown, to deprive your suppliant of the benefit of the devise so made in his favour, declines contesting the said will, or the validity thereof, during the lives of the witnesses thereto.

All which, &c., *ante*, p. 18.

In consideration whereof, and forasmuch as your suppliant cannot examine his witnesses who are aged and infirm, and not likely to live long, or have their testimony preserved in proof of the said will, without the aid of this honourable Court.

(a) See 3 P. W., p. 93.

To the end, &c., *ante*, p. 309.

Interrogating
part.
Interrogato-
ries.

1. Whether the said John Brown was not, in his life-time, and at the respective times of making the said will, and of his death, seised in fee simple of the premises before mentioned, or of some and what other estate therein?

2. Whether the said testator did not make and publish his last will and testament in writing, of such date, purport, and effect, as is hereinbefore for that purpose set forth, or of some other and what date, and to some other and what purport and effect?

3. Whether the said testator was not of sound and disposing mind, memory, and understanding, at the time of making and publishing his last will and testament, and whether the same was not duly executed, as was, at the date of said will, required by law to pass real estates by devise?

4. Whether said testator had not power to make such devise?

5. Whether the said testator did not depart this life at or about the time hereinbefore in that behalf mentioned, or at some other and what time, and whether or not without altering, or in any and what manner revoking his said will?

6. Whether he did not leave the said James Brown, his nephew and heir-at-law, or whom else his heir-at-law, him surviving?

7. Does or does not the said James Brown contest the said will, or the validity thereof?

And that your suppliant may be at liberty to examine his witnesses, with respect to the execution and attestation of the said will, and with respect to the sanity of mind of the said testator at the time of making the same, so that their testimony may be perpetuated and preserved. May it please, &c. Prayer.

[*Pray subpoena against James Brown (heir-at-law), sole defendant.*]

Bill by Devises against Heir at Law, alleging Suppression of the Will.

To the, &c.

In Chancery.

Humbly complaining, shew unto your Lordship, your suppliants John Warren of, &c., and James Warren, of, &c.

Testator
being seised,

That John Brown, late of, &c., deceased, was, at the respective times of making his will hereinafter stated, and of his death, seised in fee simple of the lands of *Greenacre*, situate in the county of Dublin.

and of sound
mind,
made his will.

And the said John Brown, being of sound mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the 1st day of May, 1835, which was executed as then by law required for passing real estates by devise, and which was in the words and figures, or to the effect and purport following, that is to say :

[Here set out the will verbatim, if it can be done ; if not, state the effect of it, devising the lands to the plaintiffs as joint tenants in fee].

His death.

Your suppliants further shew unto your Lordship, that the said testator afterwards, on or about the 1st day of May, 1837, departed this life without having revoked, or in any manner altered his said will, leaving James Brown his nephew and heir at law, the defendant hereinafter named, him surviving.

His heir

will, leaving James Brown his nephew and heir at law, the defendant hereinafter named, him surviving.

got possession
of said will,
and has sup-
pressed it,
and taken pos-
session of the
lands.

Your suppliants further shew, that the said James Brown and his family resided in the house of the said testator at the time of his death, and after the death of the said testator, he, the said James Brown, got possession of all the said testator's title-deeds and papers, and, among other important documents, the said James Brown got possession of the said testator's said will, and your suppliants shew, that the said James Brown has fraudulently suppressed, secreted, or destroyed the said will, and has entered into possession or receipt of the rents of the said lands of *Greenacre*, so as aforesaid devised to your suppliants, claiming to be entitled thereto as the heir at law of the said testator.

And your suppliants have repeatedly, and in a friendly way, applied to the said James Brown, and requested him to produce the said will of the said testator, and to hand over the same, together with the title-deeds, muniments of title, tenants' leases, and other documents relating to the said lands of *Greenacre*, so as aforesaid devised to your suppliants, and also to give up the possession to your suppliants of the lands so devised to them, and to account with your suppliants for the rents and profits thereof since the death of the said testator; and your suppliants hoped that the said James Brown would have complied with your suppliants' said reasonable requests, as in justice he was bound to do.

But now so it is, &c. (*ante*, p. 17).

Sometimes pretending that the said testator did not make such will, of such date, purport, or effect, as hereinbefore stated, or if he did, that the said testator himself, in his life-time, burned or destroyed the said will, whereas your suppliants charge the contrary thereof.

[*State any circumstances tending to disprove these pretences*]:

All which, &c. (*ante*, p. 18).

To the end, therefore, &c. (*ante*, p. 309).

[*Interrogate the defendant closely as to the existence of the will, its contents, and its suppression*].

And that the said defendant may answer the premises, and that it may be declared that your suppliants, under and by virtue of the said will of the said testator, are entitled to the said lands of *Greenacre* in the said will mentioned and described, and to hold and enjoy the same as joint-tenants thereof in fee simple; and accordingly that the said defendant may be directed by the decree of this honourable Court, to let your suppliants into possession and receipt of the rents of said lands, and to execute and deliver to your suppliants a proper conveyance thereof; and that the said defendant may be decreed to account with your suppliants for the rents and profits of the said lands which accrued due since the death of the said testator, and to pay your suppliants what may appear to be due on foot of such account; and in case the said will of the said testator shall be produced by the said defendant, or shall otherwise be forthcoming, then that the said will may be established, and the trusts thereof performed and carried into execution by and under the direction of

Applications.

Combination.

Pretences.

1. No will made.
2. Or, if made, afterwards destroyed.

General averment.

Interrogating part.

Prayer.

Declaration of plaintiffs' rights,

that plaintiffs be put into possession; that defendant convey,

and account for rents received.

If the will be forthcoming, that the trusts thereof be performed.

this honourable Court; and that your suppliants may have such further and other relief in the premises as the nature of the case may require, and as to your Lordship shall seem meet. May it please, &c.
[Pray subpoena against heir at law, sole defendant].

Bill filed on behalf of an Infant, against Trustees and Executors, for Maintenance and for an Account, &c.

To the, &c.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant John Warren, of, &c., an infant under the age of twenty-one years, by Mary Warren, of, &c., aforesaid, widow, his mother and next friend.

Testator
seised

and possessed.

That James Warren, late of, &c., deceased, was, in his life-time, and at the time of his death, seised in fee simple of, or otherwise well entitled unto divers freehold estates situate in the county of Dublin, of considerable yearly value in the whole, and was also possessed of or entitled to personal estate and effects to a large amount.

His will.

All his property to defendants,

to sell

and pay
£10,000 to
plaintiff's sister.

Residue.

And being so seised, possessed, and entitled, and being of sound and disposing mind, memory, and understanding, he, the said James Warren, duly made and published his last will and testament in writing, bearing date on or about the 1st day of May, 1840, which was executed and attested in such manner as by law required, and thereby devised and bequeathed all his real and personal estate and effects, unto John Brown and James Brown, the defendants hereinafter named, their heirs, executors, administrators, and assigns, upon trust as to his said freehold estates in the county of Dublin, as soon as conveniently might be, to sell and dispose of the same in the manner therein mentioned; and as to the sum of £10,000, part of the monies to arise from such sale, in trust for, and to pay the same unto your suppliant's sister, Mary Warren, for her own use and benefit; and as to the residue of the monies arising from such sale, and as to the residue of his, the said testator's, estate and effects,

of whatever kind, in trust for your suppliant, his executors, administrators, and assigns, absolutely ; and the said testator appointed the said James Brown and John Brown executors of his said will ; as by the said will, or the probate copy thereof, will more fully appear.

to plaintiff.

Executors.

Your suppliant further sheweth, that the said testator departed this life on or about the 3rd day of May, 1840, without having revoked or altered his said will, leaving the said Mary Warren his widow, and your suppliant, John Warren, his only son and heir-at-law, and the said Mary Warren, his only daughter, him surviving.

Testator's death.

And soon after his death the said John Brown and James Brown duly proved his said will in the proper Ecclesiastical Court, and took upon themselves the execution thereof, and possessed themselves of all the personal estate and effects of the said testator, or of so much thereof as they were able to get into their hands, to a very large amount or value in the whole, and much more than sufficient to pay and discharge all his debts, and funeral and testamentary expenses ; and a great part of such personal estate having been, since the death of the said testator, continued or placed out at interest, the said James Brown and John Brown have, from time to time, received sundry sums of money, to a large amount, for or in respect of interest or dividends arisen thereon since the death of the said testator, and they have also entered upon and taken possession of all his, the said testator's, freehold estates, and now are in possession or receipt of the rents and profits thereof.

Probate.

And your suppliant further sheweth, that he hath frequently requested the said John Brown and James Brown to account for the said testator's personal estate and effects, and the interest thereof, and the rents and profits of his said real estates, and to sell such parts of said real estates as are directed by said will of said testator to be sold, and to apply the produce thereof according to the directions of the said will of the said testator, and to lay out the surplus of the produce of such sale, together with the residue of the said testator's personal estate and effects, for the benefit of your suppliant, and to allow, out of the interest and dividends which should arise therefrom, a sufficient yearly sum for the maintenance and education of your suppliant since the death of the said testator, and for the time to come, and your suppliant hoped that his said requests would have been complied with.

Applications.

Combination. But now so it is, may it please your Lordship, that the said John Brown and James Brown, combining and confederating together and with divers, &c. (*ante*, p. 17).

Charging part. And the said John Brown and James Brown at times allege and pretend, that they cannot with safety sell the said lands without the direction of this honourable Court, by reason of the infancy of your suppliant, and of difficulties in the way of making out title to a purchaser of said lands, which render it necessary to set up and sell the same, subject to certain conditions of sale.

All which, &c. (*ante*, p. 18).

Interrogating part. To the end, therefore, &c. (*ante*, p. 309).

[*Interrogate to the stating and charging parts, and insert the last interrogatory as follows*]:

Let the said defendants set forth a true and particular account of all the personal estate and effects which were of the said testator at the time of his death, together with the nature, kind, quantities, qualities, true and utmost value thereof, and of every part thereof, and how much and what part of the said personal estate and effects have been received by, or come to the hands, possession, or power of the said defendants, or of any person or persons by their order or for their use, and how the same and every part thereof has been paid, applied, and disposed of or administered, and to whom, and for or upon what account, cause, or consideration, and how much and what part thereof remains unpaid or undisposed of, and where, or in whose hands, custody, or power, all or any part thereof now is or are, and why the same has not been got in and received, and what is the amount thereof.

And that the said defendants may set forth a true rental and particular of the real estates of the said testator, and where the same lie, and are situate, and by whom occupied, and the yearly or other rent or value thereof, and who hath or have received the rents, issues, and profits thereof since the said testator's death, and how much thereof hath come to the hands of, or been received by the said defendant; and how the same has been applied or disposed of, and who now is in perception of the said rents, issues, or profits.

And also a particular account of all sums which have been, since the death of the said testator, paid or allowed by the said defendants out of, or on account of the real and personal estate of said testator,

and when, and to whom, and for what, all such sums respectively were paid and allowed.

And that the will of the said testator may be established, and the trusts thereof performed and carried into execution; and that the freehold estates of the said testator, situate in the county of Dublin, may be sold; and that all proper parties may join in such sale; and that the title-deeds and writings now in the custody or power of the said defendants, John Brown and James Brown, or of either of them, relating to the said estates, may be produced; and that an account may be taken of the personal estate and effects of the said testator, and of the interest and income thereof since his death, and also an account of his, the said testator's, real estates, and of the rents and profits thereof which accrued due since his death, and of his debts, legacies, and funeral and testamentary expenses; and that the clear residue of the personal estate of said testator, and of the rents and profits of the real estates, and of the produce of the sale of the said estates, so directed to be sold as aforesaid, and which shall remain after payment of all debts, legacies, funeral and testamentary expenses of the said testator, may be ascertained, and be placed out at interest, or invested in government funds, with the privity of the Accountant-General of this Court, for the benefit of your suppliant, until he shall become of sufficient age to receive the same, and that in the mean time a suitable allowance may be made out of the income thereof, for your suppliant's maintenance and education; and if necessary that a Receiver may be appointed of the rents and profits of the said real estates of the said testator, and that your suppliant may have such further and other relief in the premises as to your Lordship shall seem meet, and the circumstances of the case may require. May it please, &c.

Prayer.

Execution of trusts of will.

Sale.

Account of personal

and real estates, and of income thereof, and of debts, &c.,

that residue be ascertained, and invested for plaintiff.

Maintenance.

Receiver.

[*Pray subpœna against trustees and executors, sole defendants*].

Prayer of Bill by Tenant for Life of a Residue.

Account of
personal estate.

And that the defendants may answer the premises ; and that an account may be taken of the personal estate and effects of the testator, and of his debts, legacies, and funeral and testamentary expenses.

That same may
be administered,
and residue as-
certained.

And that the said testator's personal estate may be applied in a course of administration ; and that it may be ascertained what was the clear residue of the said testator's personal estate at his death.

Reference as to
such part of
personal estate
as has been
productive
since testator's
death,
and disposal
thereof.

And that it may be referred to one of the Masters of this honourable Court to inquire and report what part of the said testator's personal estate hath from time to time since his death produced interest or dividends, and the amount of such interest or dividends, and how the same have been applied and disposed of ; and that it may be referred to the said Master to inquire and report what dividends would have arisen and have accrued if such part of the said testator's residuary personal estate, not being Government $3\frac{1}{4}$ per cent. stock, and the produce of such residuary personal estate, had been laid out in the purchase of Government $3\frac{1}{4}$ per cent. stock at the death(a) of the testator ; and also what dividends the same would have produced if laid out at the end of twelve months after the death of the said testator, and that your suppliant may be declared entitled, during his life, to the income of the said testator's residuary personal estate ; and that all proper directions may be given for the purpose of ascertaining the sum due to your suppliant in respect of such income ; and that your suppliant may have such further and other relief in the premises as to your Lordship shall seem meet, and the circumstances of this case may require.

Inquiry as to
what amount of
dividends per-
sonal estate
would have
produced,
if invested in
stock at death
of testator, and
what, if so in-
vested one year
after testator's
death.

That plaintiff
be declared en-
titled for life to
the income from
such residue.

(a) The period from which interest will be given to the tenant for life of a residue, depends upon the intention of the testator and the situation of his assets. If there be a direction in the will that the interest shall accumulate, and be laid out, with the principal, in the purchase of land, the tenant for life is generally entitled to interest from the end of a year after testator's death ; *Sitwell v. Bernard*, 6 Ves. 520 ; and see 1 Hov. Sup. 623 ; and sometimes from the conversion ; *Gibson v. Bott*, 7 Ves. 89. But upon such part of the residue as was invested at testator's death, interest is given to the tenant for life from the death of the testator ; *Angerstein v. Martin*, Turn. & R. 232 ; *Hewitt v. Morris*, *ib.* 241.

BILLS AGAINST TRUSTEES.

PRELIMINARY DISSERTATION.

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A trust may be created either by act of the party or by operation of law.

Trusts created by act of the party are :

I. Express trusts, when there is a declaration in terms of the party's intention, as when land is conveyed or devised to a trustee on trust to sell.

In the Statute 3 & 4 Will. IV. c. 27, s. 25, the expression "express trust," appears to be used in opposition to "constructive trusts," rather than

Trusts created by act of the party are—express ;

- which, if relating to land, must be by writing, and signed,
- or implied ;
- as in the case of a sale without conveyance ; or charge of debts.
- Trusts created by operation of law are—resulting trusts, as when land is conveyed to a trustee without trust declared, or where land is purchased in name of another ; and such trusts may be rebutted by parol evidence :
- or constructive trusts ;
- as in cases of graft.
- Trusts by operation of law may be created without writing.
- Trusts are cognizable only in Equity.
- Trustee of Equity how far regarded.
- to “implied trusts;” see *Salter v. Kavanagh*, 1 Dru. & Wal. p. 687; *Beckford v. Wade*, 17 Ves. 87; *Townshend v. Townshend*, 1 Cox, 28.
- By the enactment of the Statute of Frauds, 7 Will. III. c. 12, s. 4, Ir., all declarations of trusts of lands, including chattels real, shall be by writing, signed by the party.
- Any language, shewing the intention of the party who has power to dispose of the fund, however untechnical such language may be, will be a valid declaration of trust.
- II. Implied trusts, where the manifestation of intention on the part of the person who has power to dispose of the property, is not in express terms, but indirectly. Thus the vendor is a trustee by implication for the vendee, after contract for sale of an estate. So when a testator has charged his estate with debts or legacies, the heir or devisee is by implication a trustee for the creditors and legatees.
- Trusts created by operation of law are :
- I. Resulting trusts, which occur in two cases, viz.,
1. Where there is a valid disposition of the legal, but not of the equitable estate in the fund ; for example, where land is conveyed to a trustee, without a declaration, or with only a partial declaration of the trust.
 2. Where a purchase of real or personal estate is made in the name of a stranger.
- Where two persons join in a purchase, a trust results to each of them, in proportion to the amount of purchase-money paid by each.
- A resulting trust may be rebutted by parol evidence to the contrary. If a purchase be made by a father in the name of a child, the trust will not result ; but the presumption in favour of an intention to advance the child may be rebutted by parol evidence ; and this doctrine is not confined to the case of a child, but is extended to purchases in the name of a wife, grandchild, or illegitimate child.
- II. Constructive trusts are, where a person filling a fiduciary character, or having a partial interest in land, uses his influence to procure an estate or interest for himself ; in such cases he will be deemed in Equity a trustee ; thus, a trustee of a leasehold procuring a lease to himself, the new lease will be decreed a graft, see *ante*, p. 369 ; so, a person improperly procuring a conveyance, may be deemed a trustee by construction for the rightful owner.
- By the Statute of Frauds, 7 Will. III. c. 12, s. 5, trusts by implication, or construction of law, are to be of like force as if the Statute had not been made. Therefore such trusts may be created without any writing signed by the party.
- From the foregoing observations it may be collected, that trusts are the creatures of Courts of Equity, and are not cognizable either in the common Law Courts or in the Spiritual Courts.
- Generally speaking, the Courts will not recognize any estate intervening between the legal estate of the trustee, and the beneficial interest of the *cestui que trust*.

If land be conveyed in fee to A., in trust for B., and then B. grants his equitable estate to C., in trust for D.; in such case B. and C. have no estate or interest at Law or in Equity, and A. is trustee for D. Hence we have seen that trustees of an Equity are not, in general, necessary parties to a suit, *ante*, p. 34.

But, if necessary, the intervening trustee may have the legal estate vested in him, *Poole v. Pass*, 1 Beav. 600; ——— *v. Walford*, 4 Russ. 372: and the equity of redemption of a mortgagor is in Equity regarded as the estate in the land, so that the trustees of that equitable estate ought to be brought before the Court as well as the mortgagor.

It is a maxim in Equity, that a trust shall never fail for want of a trustee; it will be carried into execution against the person who has the legal estate, unless the interference of the Court is prevented by want of certainty in the terms of the creation of the trust, or by the want of consideration for its creation. Trust never fails for want of trustee.

When the owner of a property, intending to dispose of it by his will in favour of a particular person, or class of persons, instead of directly devising to such person or class of persons, suffers the legal estate to pass to his heir or devisee, yet if the testator has sufficiently manifested his intention, the intention will be effectuated by a Court of Equity: in such a case the object of the testator's bounty may, if necessary, file his bill, in the nature of an equitable ejectment, against the heir or devisee, to enforce execution of the trust, praying that the defendant may convey to him the trust estate, account for the profits thereof since the testator's death, and give him up possession. Bill against a trustee by implication to recover the trust estate.

Generally speaking, words of request, of recommendation, or expressing belief or confidence, that the person who takes the legal estate will dispose of it in the manner pointed out by the testator, are considered imperative, and, therefore, in a will, are sufficient to create a trust, where the property to be given is defined with certainty, and the persons to take it are also defined with certainty; *Cruwys v. Colman*, *supra*, (9 Ves. 319). Trust created by words of recommendation or request in will, if the fund and the objects be certain.

But the subject matter, the situation of the parties, and the probable intention, may be taken into consideration, and control the construction, *Meggison v. Moore*, 2 Ves. Jr. 630; and although, where the trust is clear, the difficulty of its execution will not prevent its being enforced, *Malone v. O'Connor*, Ll. & G. *temp.* Plunket, 465; yet if the trust be not clear, such difficulty may furnish an argument that no trust was intended, *Morice v. Bishop of Durham*, 10 Ves. p. 536; *Malone v. O'Connor*, *supra*, p. 478; and in the later cases it will be found, that the Courts rather lean against the construction which raises a trust in cases of this nature, *Sale v. Moore*, 1 Sim. 534; *Id.* 566; *Woolmore v. Burrows*, 1 Sim. 512; *Knight v. Knight*, 3 Beav. 148; see *Lewin on Trustees*, p. 66 (2nd Ed.); Ll. & G. *temp.* Sugden, 175, note; *Raikes v. Ward*, 1 Hare, 445; 1 Jarm. Wills, 334.

The *cestui que trust* may file his bill to compel his trustee to assert his legal title to renew a leasehold interest, or otherwise to act in execution of the trust, *Kirby v. Mash*, 3 Y. & Col. (Exch.), 295; but see *Lee v. Young*, *supra* (2 Y. & Col. C. C. 532). Bill to compel trustee to act.

Bill to restrain trustee from acting improperly.

Bill to follow! the trust estate improperly conveyed away.

The *cestui que trust* may file his bill for an injunction to restrain his trustee from committing a breach of trust, *Balls v. Strutt*, 1 Hare, 146.

Cestui que trust may file his bill for the purpose of following the trust estate, after a wrongful conveyance of it, either without consideration, or to a purchaser with notice of the trust, or to a purchaser without notice, claiming under a subsequently registered deed; and this even though the instrument creating the trust be merely articles of agreement; for, as we have already had occasion to observe, an equitable instrument, if registered, will, by force of the Irish Registry Act, have priority to an actual conveyance to a purchaser without notice; see *ante*, p. 42; and in addition to the cases there, see *Duchess of Chandos v. Brownlow*, 2 Ridg. P. C. 345; *Latouche v. Dunsany*, 1 Sch. & Lef. 159; *ib.* 373; *Thompson v. Simpson*, 1 Dru. & War. p. 485.

A purchaser will not be bound by notice of a doubtful Equity, *Cordwell v. Mackrill*, Amb. 515; *Parker v. Brooke*, 9 Ves. p. 588; *Green v. Pulsford*, 2 Beav. 70; but see *Thompson v. Simpson*, *supra*, where the rule is better stated thus: The Court will not, after a great length of time, fix on a purchaser a construction of a difficult instrument, which might, as between the original parties, have been the true construction.

Bill to attach the property purchased with trust money.

So also a *cestui que trust* may file his bill, for the purpose of attaching the property into which the trust fund, so far as it can be traced, has been wrongfully converted, *Liebman v. Harcourt*, 2 Mer. 513.

Thus, if a trustee of a money fund purchase an estate with it, the *cestui que trust* may sue for the money, or the estate, at his option.

Bill to set aside sale to trustee.

We have seen that a *cestui que trust* may file a bill to set aside the sale, where a trustee purchased from himself.

Bill against trustee in case of breach of trust.

In preparing a bill against trustees for a breach of trust, it is necessary that the Draftsman should bear in mind the general principles by which Courts of Equity are governed in such cases: a brief notice here of some of the most prominent of those principles will not, therefore, be irrelevant.

Acceptance of trusts necessary to constitute a trustee.

It may be premised, that a party who has neither executed the instrument by which the trust was created, nor accepted the trust, is not regarded as a trustee at all; *Townson v. Tickell*, 3 B. & Ald. 31; *Mitchell v. Nixon*, 1 Ir. Eq. R. 155. But in the absence of a disclaimer, the trustee may be presumed to have accepted the trust.

Trustee cannot divest himself of responsibility by renunciation, assignment, or delegation;

Having once accepted the trust, however, by executing the instrument creating it, or doing any other act that could be construed an acceptance, a trustee cannot afterwards discharge himself from liability, by renunciation, assignment, or otherwise, without obtaining the sanction of a Court of Equity; *Chalmer v. Bradley*, 1 Jac. & W. at p. 68; *Doyle v. Blake*, 2 Sch. & Lef. at p. 245; *Anon.* 4 Ir. Eq. R. 700; even though he assign to his co-trustee in perfect good faith; *Wilkinson v. Parry*, 4 Russ. 272. Neither can he delegate the trust to another, but will still continue responsible to the *cestui que trust*, although the person deputed may have acted in all respects as if he had been originally named trustee; *Adams v. Clifton*, 1 Russ. 297; *Kilbee v. Sneyd*, 2 Mol. at p. 199. But if the dele-

gation be in conformity with the directions of the person by whom the trust was created, the case would be different; *Kilbee v. Sneyd*, *supra*; or if the delegation were merely such as was necessary in the ordinary course of business; *Clough v. Bond*, 3 Myl. & Cr. 490.

Where there are more trustees than one, they all form, as it were, but one collective trustee, and must therefore all join in execution of the duties of the office; *Doyly v. Sherratt*, 2 Eq. Ca. Abr. 742. But in trusts of a public character, the act of the majority of the trustees will bind the rest; *Wilkinson v. Malin*, 2 Tyr. 544.

On the death or disclaimer of one or more trustees, a trust, if coupled with an interest, vests in the survivors; but a bare authority committed to several persons, is determined by the death of any one of them; *Attorney-General v. Gleg*, 1 Atk. 356. See also *Browell v. Reed*, 434, and cases there cited.

As a general rule it may be stated, that trustees are not held responsible for the acts of their co-trustees; *Leigh v. Barry*, 3 Atk. 583; nor will the circumstance of having joined in the receipt *pro forma* make any difference, since trustees must all join, as we have seen, in order to give a valid discharge; *Leig v. Barry*, *sup.*; *Sadler v. Hobbs*, 2 Bro. C. C. 114. But in such case it lies upon the trustee to shew that the money acknowledged to have been received by all, was in fact only received by one; *Brice v. Stokes*, 11 Ves. 319.

And here it may be useful to notice the difference between co-trustees and co-executors. The office of the latter is joint and several, and the act of any one co-executor is valid, for each of them has absolute control over the assets.

If an executor prove the will, and interfere no farther than is necessary to enable the acting co-executors to administer the estate, he shall not answer for a breach of trust by the acting executors; as where the executors join in selling out stock, if the produce be required to pay debts and legacies, and is paid to the acting executor for the purpose of being so applied, the other shall not be answerable, unless he stood by and saw a breach of trust committed by his co-executors; *Terrell v. Mathews*, 5 Jur. 1074; *Williams v. Nixon*, 2 Beav. 472; *Booth v. Booth*, 1 Beav. 125; and see *Bacon v. Bacon*, 5 Ves. 331.

The receipt of one executor is a sufficient discharge, therefore if both join both shall answer for misapplication, unless their joining was merely *pro forma*, and a nugatory act, as, for instance, where the receipt was signed by one executor after the money had been paid to the other; *Walker v. Symonds*, 3 Sw. p. 64.

On the other hand, the receipt of one co-trustee is not a discharge, therefore mere junction in a receipt will not make a trustee responsible for breach of trust by his co-trustee. But, generally speaking, the rule is the same as to co-trustees and co-executors, each is liable for his own acts only; so that the effect of the indemnity clause usually inserted in trustee deeds is only that of apprising the trustee of the law of the Court on the subject.

It will generally be found that where an executor or a trustee is fixed

unless made in pursuance of trust; or in the ordinary and regular course.

Office of trustees is a joint office, therefore the duties must be discharged by all of them; unless in public trusts, in which act of majority will bind the rest;

and the office will survive, unless it be a naked authority.

Trustee not responsible for acts of co-trustee.

Distinction between co-trustees and co-executors.

Indemnity clause inoperative.

with liability for the loss of trust money he never received, his liability arises not by reason of his having joined in the receipt, but by reason of his having neglected, before the money was paid, to inquire into the necessity of raising it, or else by reason of his having neglected, after the money was paid, to see to its due application. See further on this subject 9 Jarm. Conv. (3rd ed.) 718 to 727.

Trustee bound to be active in protecting trust fund.

With respect to a trustee's duties, it may be noticed that a trustee must not allow the trust funds to remain in the hands of his co-trustee beyond a reasonable time; *Walker v. Symonds, sup.* (3 Swanst. 1); or delay to take active measures for the protection of the trust fund, after having become conusant of a breach of trust having been committed by him; *Williams v. Nixon, sup.* (2 Beav. 472). He may file a bill even against the *cestui que trust* to recover the trust fund or securities; *Bridget v. Hames*, 1 Col. 72.

Must not derive profit or advantage from trust,

by buying up debts, &c.,

Courts of Equity strictly adhere to the principle of not allowing a trustee to derive any emolument or advantage from the administration of the trust; *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Hutchinson v. Morritt*, 3 Y. & Col. (Ex.) 547; and therefore a trustee trading with the trust estate, must account for the profits; *Fosbrooke v. Balguy*, 1 Myl. & K. 226; and a trustee buying up incumbrances charged upon the trust estate, for a less sum than is actually due thereon, will not be allowed to derive any advantage from such purchase; *Ex parte Lacey*, 6 Ves. 625; *Morret v. Paske*, 2 Atk. 52; and this principle applies to all persons clothed with a fiduciary character, as attorneys, guardians, heirs-at-law, executors, and (*semble*) temporary owners of the estate; *Hill v. Brown*, 6 Ir. Eq. R. 403; 2 Sugd. Vend. 432 (10th ed.); 5 Jarm. Byth. (3rd ed.) 455; *Moore v. Frowd*, 3 Myl. & Cr. 45, and cases there cited; *Fraser v. Palmer*, 4 Y. & Col. (Ex.) 515; but the general rule may, of course, be controlled by the express directions of the party by whom the trust was created; *Robinson v. Pett*, 3 P. Wms. 249; *Willis v. Kibble*, 1 Beav. 559; and a trustee may enter into a stipulation even with the Court itself, which will entitle him to remuneration; *Morison v. Morison*, 4 Myl. & Cr. 215.

or by purchasing from him.

It has been settled that a trustee for sale may not purchase from himself, for by so doing he would derive a personal benefit from the influence and information he possesses as trustee, and his duty as trustee would conflict with his interest as a purchaser, so that the transaction is altogether prohibited; *James, ex parte*, 8 Ves. 337. The trustee may indeed purchase from his *cestui que trust*, but even there the relation of trustee and *cestui que trust* must first be dissolved, and the transaction is regarded with the utmost jealousy; if any the slightest advantage have been taken by the vendee, the sale will be set aside, provided a bill for the purpose be filed in reasonable time, and the sale were not previously deliberately confirmed; *Morse v. Royal*, 12 Ves. 355.

Must take same care of trust property as of his own;

A trustee is bound to take the same care of the trust property that a prudent man would take of his own; *Massy v. Banner*, 1 Jac. & W. 241; 9 Jar. Byth. (3rd ed.) 713. Thus, with a view of placing the trust fund in a state of safety, the trustee is bound to call it in if outstanding on improper security; *Tebbs v. Carpenter*, 1 Mad. 290.

Where the trust money cannot be applied, within a short time, to the purposes of the trust, the trustee is bound to make it productive, by investing it in some proper security; but he will not be justified in taking it upon himself to lend on personal security; *Holmes v. Dring*, 2 Cox, C. C. 1; (even though he be authorized to place out the money at interest, *at his discretion*; *Pocock v. Reddington*, 5 Ves. 794); or in trade; *Cock v. Goodfellow*, 10 Mod. 489; nor in the stock of any private company, not even in bank stock; *Howe v. Earl of Dartmouth*, 7 Ves. 137; nor in public securities which are not Government securities; *Sampayo v. Gould*, 12 Sim. 426; nor will the term "Government securities" admit of its being invested in Exchequer bills; *Ex parte Chaplin*, 3 Y. & Col. (Ex.) 397; and where trustees are empowered to invest in real securities, they ought not to advance more than two-thirds of the actual value of the estate, if freehold land, and if houses, not so much; *Stickney v. Sewell*, 1 Myl. & Cr. 8; *King v. Smith*, 2 Hare, 239. Indeed, in the absence of an express power, the only safe and unobjectionable investment would be in Government funds. In England, the three *per cent.* bank annuities are selected as being least liable to redemption; *Holland v. Hughes*, 16 Ves. 111; *Trafford v. Boehm*, 3 Atk. 440; and in this country the Government three and a quarter *per cent.* stock are selected for the same reason. However the general rule as to investment in Government funds may be controlled by the manifest intention of the testator; *Caldecott v. Caldecott*, 4 Mad. 189; and trustees are not bound immediately to call in money which they find placed out on good security; *Sadler v. Turner*, 8 Ves. 617; *Angerstein v. Martin*, Turn. & Russ. 232; on the contrary a Court of Equity will not permit a real security to be called in without an inquiry whether it would be for the benefit of all parties interested; *Howe v. Earl of Dartmouth*, *sup.* (7 Ves. 137).

If a trustee, without having any object connected with the trust, and therefore in violation of his duty, sell out stock, he will be compellable, at the option of the *cestui que trust*, either to replace the specific stock, or to account for the proceeds of the sale, with interest, at a reduced rate if the case be one of mere negligence, or the full rate if it be a case of gross negligence, or corruption; *Bostock v. Blakeny*, 2 Bro. C. C. 653; *O'Brien v. O'Brien*, 1 Mol. 533; *Crackelt v. Bethune*, 1 Jac. & W. 586; and in some cases the Court will go so far as to direct rests to be made in such manner as to have the effect of charging the executor with compound interest; *Raphael v. Boehm*, 11 Ves. 92; but this decision has been observed upon as severe; see *Tebbs v. Carpenter*, *sup.* (1 Mad. 290).

A trustee distributing trust funds is bound to take care that they go into the hands of persons who are legally entitled to receive them, and mere mistake as to the right of parties will not exonerate the trustee if a loss accrue from such mistake, although he may have acted under the advice of counsel; *Doyle v. Blake*, 2 Sch. & Lef. 243; but the Court will sometimes take this latter circumstance into consideration in deciding the question of costs; *Angier v. Stannard*, 3 Myl. & K. 566; and see *Vez v. Emery*, 5 Ves. 141.

A trustee is of course bound to fulfil to the utmost of his power the intention of the party by whom the trust was created, and therefore if the:

must invest within reasonable time in good security, not personal,

nor private,

but in Government funds;

unless contrary intention appears.

Money outstanding on good real security not to be called in without inquiry.

Effect of selling out stock in breach of trust.

Trustee bound to see funds properly distributed.

How far trustees are bound to procure renewals.

trust property consist of renewable leaseholds, and that the intention to have the interest kept renewed clearly appear on the face of the instrument, and that the trustee have funds in his power sufficient for the purpose, as it is clearly his duty to renew, he will be held responsible for neglecting so to do; *Lord Montford v. Lord Cadogan*, 17 Ves. 488; S. C. 19 Ves. 638; and a direction to renew from time to time "as occasion may require, and as the trustees may think proper," does not give the trustees an arbitrary power of renewing or not, but the clause only means as they may think proper for the interests of the *cestui que trust*, to relieve the trustee from the necessity of submitting to exorbitant demands; *Milsington v. Mulgrave*, 3 Mad. 491; but it has been held that the mere interposition of a trustee in a settlement, without any express direction as to renewals, will not make it obligatory on trustees to renew; *O'Ferrall v. O'Ferrall, Ll. & Goold, temp. Plunket*, 79.

Trustee may do without suit what would be done by Court,

With respect to the power of a trustee, it may be laid down as a rule, that what is compellable by suit is equally valid if done by the trustee without suit; *Waldo v. Waldo*, 7 Sim. 261; *Lee v. Brown*, 4 Ves. p. 368. Thus, for example, a trustee may allow a maintenance out of the interest of a legacy, or advancement out of the principal, where the Court would do it; but the institution of a suit takes the case out of the hands of the trustee, and transfers it to the Court; *Walker v. Smallwood*, Amb. 676; *Mitchelson v. Piper*, 8 Sim. 64; *Attorney-General v. Clarke*, 1 Beav. 467. Every subsequent act of the trustee ought to be done under the authority of the Court; for instance, a trustee for sale cannot sell after bill filed for execution of the trust.

but cannot act after suit instituted.

The Court will not, without good cause, control the exercise of a discretionary power.

Where trustees were empowered to invest the fund in freehold or leasehold property, and declined to comply with the request of the tenant for life to invest in leasehold, the Court would not compel them so to do, the power appearing to be discretionary, and the discretion not corruptly exercised; and see *Kennedy v. Turnley*, 6 Ir. Eq. R. 399, and *Lee v. Young*, 2 Y. & Col. C. C. 532, as to how far the Court interferes to control the exercise of a power to appoint new trustees.

Breach of trust when specialty debt.

Breach of trust is a specialty debt if the trustee have by deed covenanted to perform the trust; otherwise it is but a simple contract debt.

Contribution. Interest of acquiescing *cestui que trust* primarily liable for breach of trust, and may be applied accordingly by the trustees.

Each trustee is personally liable to the *cestui que trust* for the whole loss; but as between the trustees liable, each is entitled to contribution from the others; and the estate of a *cestui que trust*, who, being aware of the material facts, has assented to the breach of trust, is the primary fund to make good the loss; *Trafford v. Boehm*, 3 Atk. 440; *Montfort v. Cadogan*, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3; *Jacob v. Lucas*, 1 Beav. 436; and see *ib.* 576 and 125; and where a partial owner of the trust fund was a party concerned in the breach of trust, the trustees may apply his interest in the fund to make good the loss; *Priddy v. Rose*, 3 Mer. p. 105; *Woodyatt v. Gresley*, 8 Sim. 180, and *semble* a trustee cannot by contract waive his right to resort to the interest of the partial owner of the trust fund, since the effect of allowing such waiver to be enforced would be to lessen the security of the *cestui que trusts*; *Fuller v. Knight*, 6 Beav. 205.

A *cestui que trust* who previously, and with full knowledge of the material facts, assented to the breach of trust, or subsequently acquiesced in or confirmed it, of course cannot sue the trustees for the consequences of such breach of trust; *Walker v. Symonds, sup.* (3 Sw. p. 64); *Wedderburne v. Wedderburne*, 4 Myl. & Cr. 41. But it should be remembered, that *femes covert* and infants, while under disability, are incapable of assenting to, acquiescing in, or confirming a breach of trust; *Cocker v. Quayle*, 1 Russ. & Myl. 535. See 9 Jar. Byth. (3rd ed.) 727.

Suit for breach of trust barred by evidence that plaintiff previously assented, or afterwards acquiesced or confirmed it;

A trustee charged with a breach of trust may discharge himself so far as he can shew the trust fund to have been duly applied; *Underwood v. Stevens*, 1 Mer. 712; *Shipbrook v. Hinchinbrook*, 11 Ves. 252; *Brice v. Stokes*, 11 Ves. 319; *Williams v. Nixon, sup.* (2 Beav. 472).

or by evidence of due application;

In order to make trustees answer for a breach of trust, it is not enough for the plaintiff to shew the breach of trust, and that he is injured thereby; it must further appear that the plaintiff is entitled to call the trustee to account. Thus, where a trustee to preserve joins in destroying contingent remainders created by a settlement, this may be a breach of trust, and all the remainder-men may be injured by it, yet it has been held, that none can complain of it but the first and other sons of the marriage, for they alone are the immediate objects of the settlement, and directly within the consideration of it; *Tipping v. Piggot*, Gilb. Eq. Ca. 34; *Moody v. Walters*, 16 Ves. pp. 312, 313; *Jer. Eq. Jur.* 152.

or by want of title in plaintiff to call the trustee to account.

There are three modes by which a trustee may be removed from his office:

Trustee removed;

1. He may retire with the consent of all the *cestui que trusts*, if all be in existence and free from disability.

by consent;

2. He may retire by virtue of a special power contained in the instrument creating the trust: in such case it is of course incumbent on the retiring trustee to see that the terms of the power are strictly complied with; otherwise his responsibility continues, while the new trustee is incapable of exercising the power with which, if properly appointed, he would be invested; *Sharp v. Sharp*, 2 B. & Ald. 405; *Morris v. Preston*, 7 Ves. 547; *In re Roche*, 2 Dru. & War. 287; *Wilkinson v. Parry, sup.* (4 Russ. 272); *Ex parte Davis*, 2 Y. & Col. C. C. 468. Pending suit to administer the trust fund, the power cannot be exercised without the sanction of the Court; *Attorney-General v. Clack*, 1 Beav. 467.

by virtue of a power;

If there be neither the consent of the *cestui que trust*, nor a power contained in the instrument, the removal of the trustee can only be effected by the authority of a Court of Equity; for which purpose a bill must be filed, unless there be a suit already instituted in relation to the trust fund, or unless the case come within the provisions of the "Trustee Act," commonly called "Sugden's Act" (11 Geo. IV. & 1 Will. IV. c. 60).

or by the Court.

Where there is in the instrument creating the trust a power authorizing the appointment of new trustees in case the old trustee shall desire to be discharged, the trustee may retire when he pleases, at the expense of the trust estate.

The Court will not authorize the insertion of a clause in the instrument

- by which the trust is created, empowering the new trustees to appoint others in their room; *Brown v. Brown*, 3 Y. & Col. (Ex.) 395.
- Bill to remove a trustee may be by *cestui que trust*.** The *cestui que trust* may file a bill for removal of an old trustee, and for the appointment of a new trustee in his place, if reasonable cause can be shewn; for instance, if the old trustee refuse to act, or become bankrupt, or abscond, or otherwise become incapable of acting in, or disqualified for the office. So also if the old trustee should die, or should commit a breach of trust, or misconduct himself as trustee; *Bainbrigge v. Blair*, 1 Beav. 495; *In re Roche, sup.* (2 Dru. & War. 287).
- New trustee not usually appointed without a reference.** And if a suit be pending in respect to the trust fund, a new trustee would, if necessary, be appointed on motion; — *v. Robarts*, 1 Jac. & W. 251; or rather a reference would be directed to a Master to approve of a proper person to be a trustee, for without such reference the Court will not usually appoint a trustee; *In re Roche, sup.* (2 Dru. & War. 287).
- Bill for removal of trustees by the trustees.** A bill for removal of trustees may also be filed by the trustees themselves or by one trustee against the remaining trustee or trustees and the *cestui que trusts*; but a special case must be made to induce the Court to remove a trustee at his own request; *Goddart v. Hawksley*, 3 Law Rec. N. S. 262.
- Its frame.** It sets forth the instrument creating the trusts, so far as relates to the trusts, and states that the instrument did not contain a power to change the trustees, and having stated the circumstances which render it desirable that a new trustee should be appointed, and interrogated to the material facts, it prays that it may be referred to the Master to approve of a proper person or persons to act as trustee or trustees, and that the person or persons in whom the trust estate is vested, may join in assigning the trust premises to the new trustee or trustees, jointly with the continuing trustee, or solely, as the case may be, and thereupon that the retiring trustee or trustees may be discharged (in a proper case), and may be allowed their costs out of the trust funds.
- Costs upon removal of trustee.** When the trustee retires from necessity, or upon good grounds, his costs will be allowed as a matter of course, out of the trust funds; *Coventry v. Coventry*, 1 Keen, 758; and where there is a fund under the control of the Court, the costs will be allowed as between solicitor and client; *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93; *Mohun v. Mohun*, 1 Swanst. 201; *Moore v. Frowd, sup.* (3 Myl. & Cr. 45).
- However, a trustee will not get his costs if he retire without good reason; and of the sufficiency of the reason it will be for the Court to judge; *Howard v. Rhodes*, 1 Keen, 581; *Greenwood v. Wakeford*, 1 Beav. 576; and if the misconduct or neglect of the trustee have occasioned the suit, he may have to pay the costs in whole; *Kirby v. Mash*, 3 Y. & Col. (Ex.) 295; or in part; *Pocock v. Reddington*, 5 Ves. 794; but misconduct, if only slight, will not in general disentitle a trustee to his costs; *Bennett v. Atkins*, 1 Y. & Col. (Ex.) 247; *Bailey v. Gould*, 4 Y. & Col. (Ex.) 221; *Fitzgerald v. Pringle*, 2 Mol. 534.
- Petition under "Sugden's Act," for removal of trustee.** We now proceed to consider in what cases the sanction of the Court for the removal of a trustee may be obtained without a bill being filed for the purpose, by means of a petition under the Stat. 1 Will. IV. c. 60.

The Statute 1 Will. IV. c. 60, s. 22, is as follows:

"And whereas cases may occur, upon applications by petition under this Act for a conveyance or transfer, where the recent creation or declaration of the trust or other circumstances may render it safe and expedient for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery (as the case may require), to direct by an order upon such petition, a conveyance or transfer to be made to a new trustee or trustees, without compelling the parties seeking such appointment to file a bill for that purpose, although there is no power in any deed or instrument creating or declaring the trusts of such land or stock, to appoint new trustees; Be it therefore further enacted, that in any such case it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the said Court of Chancery, to appoint any person to be a new trustee by an order to be made on a petition to be presented for a conveyance or transfer under this Act, after hearing all such parties as the said Court shall think necessary; and thereupon a conveyance or transfer shall and may be made and executed, according to the provisions hereinbefore contained, to or so as to vest such land or stock in such new trustee, either alone or jointly with any surviving or continuing trustee, as effectually and in the same manner as if such new trustee had been appointed under a power in any instrument creating or declaring the trusts of such land or stock, or in a suit regularly instituted."

Section 22 of the "Trustee Act."

In order to determine whether a case is proper for a petition under this section, the Pleader must have regard to the following points, viz.:

1. The Court has no jurisdiction under this section, to appoint new trustees, unless the party has a right to apply by petition under the former sections of the Act, that is, unless a conveyance or transfer be required, which cannot be procured by reason of disability in the trustee, he being an infant, a lunatic, absent beyond sea, &c.; *In re Fitzgerald*, Ll. & G. temp. Sugden, 20; *Ex parte Coyne*, Ll. & G. temp. Plunket, 134; *In re Earl of Mayo*, *ib.* 118; *Harte v. Ffrench*, 2 Dru. & War. 292; *In re Faireswell*, 2 Jurist, 987.

Trustee will not be appointed by petition under this section, unless where a conveyance, &c. of the trust fund is prevented by disability in the trustee.

The title of the Act shows that it was passed to amend the laws respecting conveyances and transfers of estates and funds vested in trustees; and the recital in this 22nd section confines the jurisdiction to cases in which application is made, *under the Act*, for a conveyance or transfer. If, therefore, no conveyance be required, although for some other purpose the appointment of a new trustee may be necessary; *In re Down*, 2 Jur. 886; or if a conveyance be prevented not by the disability of the trustee, but only by his refusal to act, there the appointment of new trustees, in a case where there is no power given by the instrument, can only be procured by a bill; *In re Pennefather*, 2 Dru. & War. 292; *In re Hartford*, *ib.*; *Harte v. Lord Ffrench*, *ib.*; *In re Hossford*, 1 Jones, 550; *Whitley v. Fishbourne*, 4 Law Rec. N. S. 77; *Clarke v. Wilson*, H. & Jones, 424; and it seems that incapacity to manage business, not amounting to lunacy, is not such a disability as gives jurisdiction under the Act; *In re Wakeford*, Jones & L. 2.

2. The remedy by petition under this Act for the appointment of new trustees is inapplicable, unless the trust be simple, and the rights of the par-

Nor unless the petitioner's title be clear and simple.

ties clear and plain: the legislature only contemplated as coming within this 22nd section, cases, in which the recent creation of the trust, or other circumstances rendered it safe and expedient to appoint new trustees, without compelling the parties seeking such appointment to file a bill for the purpose; for instance, the case of a recent trust, created within ten years, for A. for her separate use for life, remainder to B. in fee; then, if the trustee has gone abroad, and no question can arise, the Court would, on petition, appoint a new trustee under the 22nd section, as well as direct a transfer under some of the other sections of the Statute; *ex parte Whitley*, Ll. & G. temp. Sugden, 23; *In re Nichols*, *ib.* 17; and see upon other sections the cases *In re Merry*, 1 Myl. & K. 677; *In re De Clifford*, 2 Myl. & K. 624. If, therefore, there be an ambiguity in the construction of the instrument creating the trust—if the title of the claimant be such as to require investigation in the presence of the parties interested—or, finally, although the facts of the case clearly bring it within the provisions of the Act, yet if they are complicated in their nature, then the Court will compel the party seeking the appointment of a new trustee to file a bill for the purpose; *Archer v. Roe*, 3 Law Rec. N. S. 172; *Whitley v. Fishbourne*, *sup.* (Ll. & G. temp. Sugden, 23).

It is true, as we have seen, that the Court has no jurisdiction to appoint trustees under the 22nd section, unless the applicant has a right under the former sections to apply for a conveyance or a transfer, but then there may be many cases in which the party would have a right to apply by petition under the 8th or some of the other sections for a conveyance or transfer, and yet the Court, in the exercise of the discretion given by the 22nd section, would not deem it either *safe* or *expedient* to appoint a new trustee without a bill filed for the purpose.

Nor unless the trustee have accepted the trust.

3. The Court has no jurisdiction to appoint a new trustee under the 22nd section, unless there is a trust fund outstanding, vested in a trustee who has accepted the trust; *In re Clarke*, 1 Jurist, 737. If the trustee has disclaimed the trust he is not a trustee, and therefore cannot be compelled to transfer the fund, which was never vested in him; *In re Greene*, 3 Law Rec. N. S. 222; Jem. Sug. Act (2 ed.) 176; *Mitchell v. Nixon*, 1 Ir. Eq. R. 155. But after a considerable length of time from the creation of the trust without a disclaimer, twenty or thirty years, *e. g.*, although the trustee has never acted, yet he will be presumed to have accepted the trust; *In re Uniacke*, Jones & L. 1; *In re Needham*, *ib.* 34.

Nor if trustee of a part of the fund can be appointed by bill only.

4. The Court will not appoint a trustee under the 22nd section, if part of the trust fund be so circumstanced as to render it necessary to file a bill for the appointment of trustees in respect to it; the same persons ought to be trustees of every part of the trust property, and the Court will not appoint trustees in a summary and irregular manner, when trustees must be appointed in a regular way; *In re Anderson*, Ll. & G. temp. Sugden, 27.

Trustee not usually appointed without a reference.

The Court has frequently refused to appoint a trustee without a reference to the Master; *In re Roche*, 2 Dru. & War. p. 290; but see *Ex parte Shick*, 5 Sim. 281, in which case, however, the petitioner was exclusively interested in the trust fund; see also *Ex parte Ingersole*, 2 Gl. & J. 230.

It may be further observed, that the insecurity of the trust property does not give the Court jurisdiction under the Act; *Whitley v. Fishbourne, sup.* (Ll. & G. *temp.* Sugden, 26).

But, on the other hand, if the Court has jurisdiction to appoint trustees under this 22nd section, and if the facts of the case be such that the Court will deem it safe and expedient to exercise the jurisdiction, the existence of a power to appoint trustees in the instrument creating the trust will not deprive the party of the benefit of the statutory power, if the power in the instrument will not reach the case. It is true that the recitals in the 22nd section refer to cases where it may be expedient to direct a conveyance to a new trustee although there is no power in the instrument creating the trust to appoint new trustees; but there may be a defective power in the instrument, and yet no such power as would be applicable to the circumstances of the case; the case of no power whatever in the instrument is the extreme case; if the Court may make the appointment where there is no power for that purpose in the instrument, it surely may do so where the instrument does contain such a power; *In re Fauntleroy*, 10 Sim. 252; *In re Batty*, 3 Law Rec. N. S. 171; and see *In re Roche, sup.* (2 Dru. & War. 287); *In re Ledwich*, 6 Ir. Eq. R. 561. And further, the Court will appoint any proper number of new trustees, though exceeding the original number; *In re Welch*, 3 Myl. & Cr. 292; and never less than the original number; *In re Lea*, 4 Law Rec. N. S. 97. Moreover an executor may be so situated as to be a trustee within the 22nd section; *Ex parte Dover*, 5 Sim. 500; and see *In re Anderson, sup.* (Ll. & G. *temp.* Sugden), p. 29; *Cockell & Pugh*, 6 Beav. 293.

Where a trustee becomes bankrupt, the Irish Bankrupt Act, 6 Will. IV. c. 14, s. 93, authorizes the Lord Chancellor to order a conveyance or assignment to other trustees; see 1 Darley's Statutes, 1836, n. (b); and see *Lewin Trust*, 599; *In re Roche*, 2 Dru. & War. 287.

Inasmuch as the right to apply by petition for the appointment of a new trustee under the 22nd section of the Act, depends on the existence of a right to apply for a conveyance under some one of the former sections, and inasmuch as besides the appointment of trustees the applicant will require a conveyance or transfer under some other section of the Act, it will not be irrelevant here to refer to these other sections, and to the cases which have been decided upon them.

The object of this Act is to enable Courts of Equity to give a good title to what they sell, and to enlarge their powers in respect to trustees and mortgagees.

The 3rd, 4th, and 5th sections of the Act relate exclusively to lunatics being trustees or mortgagees.

By the 3rd and 4th, the committee of the estate of any lunatic, idiot, or *non compos*, may, by direction of the Lord Chancellor, convey the lands or transfer the stock, and by the 5th section, when the lunatic has not been found such by inquisition, so that there is no committee, the Lord Chancellor may appoint a person to convey or transfer.

Trustee will be appointed on petition under this section, although there be a defective power in the trust deed.

Court may exceed the original number of trustees.

Executor may be trustee.

Trustee becoming bankrupt, appointment of new trustee.

Other sections of the "Trustee Act" considered.

Object of the Act.

3rd, 4th, and 5th sections, as to lunatic trustees.

The first proceeding under these sections is to direct an inquiry whether the case is one within the Act.

With regard to *lunatics* it has been held that the Vice-Chancellor has no jurisdiction to direct an order of reference under the Act; *In re Shorrocks*, 1 Myl. & Cr. 31; nor the Court of Exchequer, notwithstanding the powers given to that Court by the 30th section of the Act; *In re Prideaux*, 2 Myl. & Cr. 640; *In re Skerrett*, 2 Dru. & War. 585, 590.

With regard to the costs of a lunatic trustee, it has been held that they must be borne by the *cestui que trust* and not by the lunatic's estate; *In re Tuffnell*, 2 Collinson Lunacy, 731; *Ex parte Pearse*, T. & Russ. 325; but a distinction has been taken between the case of a lunatic trustee and mortgagee; *Ex parte Richards*, 1 Jac. & W. 264. Whether there is any solid ground for such distinction seems doubtful; see *In re Marrow*, 1 Cr. & Ph. 142. See also *In re Doolan*, 3 Dru. & War. 442. The mortgagor, and not the estate of the lunatic mortgagee, will, it is submitted, be liable to the costs.

Under the 5th section it has been held, that the summary jurisdiction thereby given does not extend to a case in which the fact of the lunacy is contested; *In re Walker*, 1 Cr. & Ph. 147; nor to a case where a committee has been appointed in England, and the stock is to be transferred in Ireland; *In re Tottenham*, 1 Jurist, 653.

6th section as to infant trustees.

The 6th section remedies the disability of *infancy* in respect of *lands* vested in an infant upon trust, or by way of mortgage, and enables the infant to convey under the direction of the Court.

Under this section it has been held, that the infant heir of a mortgagee directed to convey is entitled to his costs; *Miltown v. Trimleston*, Fl. & K. 338. As to the effect of conveyances by infant trustees or mortgagees, independently of the Statute, see *Allen v. Allen*, *sup.* (2 Dru. & War. 307); *Zouch v. Parsons*, 3 Burr. 1794; — *v. Hancock*, 17 Ves. 363-4.

Section 8. Trustees of freeholds out of jurisdiction, &c.

The 8th section remedies sundry other inconveniences in the case of *freeholds*, being confined to trustees of real estate.

This section provides for five classes of cases:

1. When the trustee shall be out of the jurisdiction, or not amenable to the process of the Court.
2. When it shall be uncertain, in the case of several trustees, which of them was the survivor.
3. When it shall be uncertain whether the trustee last known to have been seised be living or dead.
4. When it shall not be known who is the heir of the trustee last seised.
5. When any trustee, or the heir of any trustee, shall neglect or refuse to convey for twenty-eight days next after tender of a conveyance by a person entitled to require the same.

In any of these five cases the Court is authorized to direct any person, in the place of the trustee or heir, to convey; see *Pomeroy v. Ponsonby*, 3 Law Rec. N. S. 36.

This section does not apply to constructive trusts, or trustees by opera-

tion of law; *In re Dearden*, 3 Myl. & K. 508; nor to the infant heir of a mortgagor out of the jurisdiction, the mortgage having been foreclosed; *Goddard v. Macaulay*, 6 Ir. Eq. R. 221; nor to a trustee who is not bound, as such, to execute the deed in question; *Fitzgibbon v. Lewis*, 6 Ir. Eq. R. 560.

With respect to cases where the title of the petitioner is not plain, or when the trust is complicated, the result of the authorities seems to be, that the Courts have jurisdiction to make the order on petition, if, in the exercise of the discretion given by the Act, they should be of opinion that the jurisdiction can be safely exercised; see *In re Merry*, 1 Myl. & K. 677; *In re De Clifford*, 2 Myl. & K. 624, 820.

The word *trust* in the 8th section was held not to include the case of a mortgagee; *In re Goddard*, 1 Myl. & K. 25; *Bailie v. Mills*, 1 Law Rec. N.S. 67; "Sugden's Act," by Jemmett, 151, n.; see also *Green v. Holden*, 1 Beav. 207; but the Statute 4 & 5 Will. IV. c. 23, s. 2, having enacted that when any person seised of any land, upon any trust, or by way of mortgage, died without an heir, it should be lawful for the Court of Chancery to appoint a person to convey such land, in like manner as was provided by the 1 Will. IV. c. 60, in case such trustee or mortgagee had left an heir and it was not known who was such heir, several decisions were made in favour of the extension of the 8th section of the "Trustee Act" to the case of mortgagees; *Ex parte Whitton*, 1 Keen, 278; *In re Thomson*, 12 Sim. 392. Still, however, some doubts existed on the subject, and to remove those doubts the Statute 1 & 2 Vict. c. 69, enacted, that where any person seised of land by way of mortgage, should have died *without having been in possession, and the money due should have been paid to his executor or administrator*, and the devisee, or heir, or other real representative of such mortgagee, should be out of the jurisdiction, or not amenable to the process of the Court, or it should be uncertain when there were several devisees or representatives who were joint-tenants, which of them was the survivor, or it should be uncertain whether any such devisee, or heir, or representative were living or dead, or if the heir were unknown, or in case of neglect or refusal to convey for the space of twenty-eight days after tender of conveyance, the Court might appoint a person instead, to convey.

It is to be observed that this Statute embraces the event of there being no heir of the trustee—a case not provided for by the 8th section of the "Trustee Act."

But the necessity of resorting to this Statute is in most cases done away with by the Statute 7 & 8 Vict. c. 76, s. 9, which enacts, that where any person entitled to freehold or copyhold land, by way of mortgage, has or shall have departed this life, and his executor or administrator is or shall be entitled to the money secured by the mortgage, and the legal estate in such land is or shall be vested in the heir or devisee of such mortgagee, or the heir, devisee, or other assignee of such heir or devisee, and possession of the land shall not have been taken by virtue of the mortgage, nor any action or suit be depending, such executor or administrator shall have power, upon payment of the principal money and interest due to him on the said mortgage, to convey by deed or surrender, as the

case may require, the legal estate which became vested in such heir or devisee, and such conveyance shall be as effectual as if the same had been made by any such heir or devisee, his heirs or assigns.

Section 9.
Trustees of
chattels real
out of jurisdic-
tion, &c.

The 9th section remedies certain inconveniences relating to chattels real, and enacts, that when any person possessed of land for a term of years upon trust, shall be *out of the jurisdiction, or not amenable to the process of the Court, or it shall be uncertain whether the trustee last known to have been possessed as aforesaid shall be living or dead*, or if any trustee as aforesaid, or the executor of any such trustee, shall neglect or refuse, &c. (as in the 8th section), the Court may appoint a person to assign or surrender."

Section 10.
Trustees of
stock out of ju-
risdiction, &c.

The 10th section relates to inconveniences in respect of stock, and enacts, "That if any person, in whose name, as a trustee or executor, or in the name of whose testator, any stock shall be standing, shall be *out of the jurisdiction, or not amenable to the process of the Court, or it shall be uncertain whether such person be living or dead*, or if any such trustee or executor shall neglect or refuse to transfer such stock, or receive and pay over the dividends thereof for the space of thirty one days after request in writing by the person entitled, the Court may appoint a person to transfer the stock, or receive and pay over the dividends.

Sections 8, 9,
10 compared.

The distinction between the 8th, 9th, and 10th sections should not be overlooked.

The 8th section refers to land generally.

The 9th section refers to land held for terms of years.

The 10th section refers to stock.

The 9th and 10th sections are less extensive than the 8th; the framer of the Act, being desirous not to interfere with the jurisdiction of the Ecclesiastical Court, designedly omitted the second and fourth classes of cases provided for by the 8th section, because it was not intended to render administrations unnecessary by supplying a *personal* representative, but to provide only for the want of a *real* representative, there being no other way of supplying such a representative; *In re Anderson, sup.* (Ll. & G. temp. Sugden, 27).

The 10th section is, in one respect, more extensive than either the 8th or 9th, inasmuch as it provides for the trustee's neglect or refusal to receive and pay over the dividends, whereas the 8th and 9th sections do not provide for the case of a trustee of land neglecting or refusing to receive and pay over the rents.

The tender mentioned in the 8th, 9th, and 10th sections should be made by the persons entitled to require the conveyance or transfer, that is, by all the *cestui que trusts*; and it has been held, that service on the party required to transfer, of an order of the Court to that effect, is not a compliance with the words of this section, which directs the person entitled, to make a request in writing; *Madge v. Riley*, 3 Y. & Col. (Ex.) 425. On an application under these sections, if the trustee be out of the jurisdiction, it must be shewn by affidavit where he is resident, and if in England, notice must be served on him; *Ex parte Hughes, Jones & L.* 32; S. C. 6 Ir. Eq. R. 559; and see *In re Byrne*, 6 Ir. Eq. R. 563. Upon the question

what persons are trustees within the 10th section, see *Ex parte* Dover, 5 Sim. 500; *Hutchinson v. Stevens*, *ib.* 498; *Ex parte* Hagger, 1 Beav. 98; and see *Ex parte* Winter, 5 Russ. 284; *Cockell v. Pugh*, *sup.* (6 Beav. 293).

The sections to number 10, inclusive, point out *by* whom the conveyance is to be made—the 11th, *to* whom it is to be made.

Section 11.

The 11th section determines the mode of proceeding under the Act, by declaring that every direction or order to be made under the Act shall be signified either by an order made *in a cause depending in the Court*, or upon *petition in the lunacy or matter*, and when the order is made on petition, it declares who shall be the petitioner.

As to the mode of proceeding.

Under this Act two petitions seem necessary. The order on the first petition refers it to the Master to inquire into the facts, and whether the party were a trustee within the Act; *In re* Ledwich, *sup.* (6 Ir. Eq. R. 561-2); *Anon.* 5 Sim. 322; *Pomeroy v. Ponsonby*, 3 L. R. N. S. 86, n. (c). See form of order in *In re* Chambers, 3 Dru. & War. 496.

The order on the second petition confirms the report, and gives the consequential directions. Upon the question how far a petition may be dispensed with, when there is a cause pending, see *Broom v. Broom*, 3 Myl. & K. 443; *Walton v. Merry*, 6 Sim. 328; *Miller v. Knight*, 1 Keen, 129; *Callaghan v. Egan*, 1 Dru. & Wal. 187; but see *Fellowes v. Till*, 5 Sim. 319; *Prytharch v. Havard*, 6 Sim. 9; *Baynes v. Baynes*, 9 Ves. 462, *contra*.

The petition need not be entitled in the matter of the Act; *In re* Fowler, 2 Russ. 449.

Where a bill was filed to have stock transferred, and subsequently a petition was presented for the same purpose, the Court refused to make the order on petition, and required that the cause should be set down; *Burr v. Mason*, 2 S. & St. 11. The petition should be presented in the names of the *cestui que trusts*, and not in the names of the intended new trustees, who, until appointed, are mere strangers to the trust; *In re* Odell, *Hayes*, 257.

The 12th section provides, that if the title of the person claiming the conveyance or transfer require investigation, or it otherwise appear improper to make an order on petition, the Court may direct a bill to be filed to establish the right of the party, and thereupon by decree or order to direct a conveyance; see 3 Russ. p. 596; *Ex parte* Mayo, *sup.* (Ll. & G. *temp.* Plunket, p. 121).

Section 12.

Court may direct bill to be filed.

Section 13 provides, that committees, infants, or other persons directed by virtue of the Act to convey, &c., may be compelled to do so.

Section 13.

Section 14 provides that money in discharge of mortgage or incumbrance payable to an infant, may be paid into bank, as the Court shall direct.

Section 14.

The following sections to the 21st, inclusive, define who are trustees within the Act.

The 15th section provides, that persons who are in other respects within the Act shall be deemed trustees, though they have an interest in the subject, or a duty to perform; see *Hutchinson v. Stephens*, *sup.* (5 Sim. 498).

Section 15.

Trustees having an interest.

The 16th section provides that the heir of a vendor, after a decree for

Section 16.

Heir of vendor or nominal purchaser.

specific performance, and a nominal purchaser or his heir shall, after decree declaring him a trustee for the real purchaser, be deemed trustees within the Act; see *Walton v. Merry, sup.* (6 Sim. 328); *In re Down*, 2 Jurist, 836.

Section 17.
Tenant for life after decree for specific performance of contract to sell.

The 17th section provides that when land was contracted to be sold, and the vendor died, having devised same for life, &c., with remainder over, in such manner as that a conveyance cannot be obtained, the Court, after a decree for specific performance, may direct the tenant for life, &c., to convey the fee.

Section 18.
Constructive or resulting trusts.

The 18th section extends the Act to every other constructive or resulting trust; but when the trustee claims an adverse beneficial interest, the trust must be first established by a decree, before an order for conveyance, &c., can be had under the Act. This section does not extend to the case of a partition, nor to the case of an exchange; *Turner v. Edgell*, 1 Keen, 502.

The three preceding sections relate to constructive trusts, which trusts were not within the former Acts; see *Goodwin v. Lyster*, 3 P. Wms. 387; *Dew v. Clarke*, 4 Russ. 511-14; *In re Moody*, 1 Tamlyn, 4.

But now if a man sell an estate, and die leaving an infant heir, such heir, after decree for specific performance, is compellable to convey, and the costs of the suit will be paid out of the purchase-money; *Prytharch v. Havard, sup.* (6 Sim. 9).

Under the 18th section an infant tenant in tail of lands decreed to be sold for payment of an equitable charge is a trustee for the purchaser constructively, and will be directed to execute the conveyance to the purchaser; *Peyton v. McDermott*, 6 Ir. Eq. R. 220; and if he refuse to comply with the terms of the order, after the time limited by the 8th section, the Master will be directed to execute for him, *ib.*; see also *Prendergast v. Eyre*, L.L. & G. *temp.* Sugden, 11; *Walters v. Jackson*, 12 Sim. 278; *ib.* 161; *Warburton v. Vaughan*, 4 Y. & Col. (Ex.) 247.

Section 19.
Husbands of trustees.

The 19th section provides that husbands (whether under disability or not) of *femes covert* trustees within the Act, shall be deemed trustees within the Act; see *Moore v. Vinten*, 12 Sim. 161.

As to cases where a fine or recovery is necessary; see *Ex parte Maire*, 3 Atk. 479; *Ex parte Johnson, ib.* 559.

Section 20.
Lunatic trustees with an interest or duty.

The 20th section extends the Act to all lunatic trustees, who, if of sound mind, would be compellable to convey, though they have an interest in the trust fund, or a duty to perform; see *Tutin, ex parte*, 3 V. & B. 149.

Section 21.
Charity and friendly societies.

The 21st section extends this Act to petitions in cases of charity and benefit or friendly societies; see *Ex parte Norrish*, Jac. 162; *In re A Friendly Society*, 1 S. & St. 82; *Ex parte Seagears*, 1 V. & B. 496.

The 22nd section, respecting the appointment of new trustees, has been already observed upon.

Section 23.

The 23rd section provides that when all the trustees of any charitable or public trust are dead, and the representative of the survivor shall not prove his title within the time limited by this section, the Court may appoint new trustees.

The 24th section declares the mode of proceeding when trustees, defendants in Equity, cannot be found. Section 24.

The 25th section provides for the payment of costs relating to proceedings under the Act. Section 25.

The 26th, 27th, 28th, 29th, 30th, and 31st sections regulate the jurisdiction, under the Act, of the several Courts of Equity in England and Ireland. Sections 26, 27, 28, 29, 30, and 31.

The 32nd section declares who shall be appointed by the Court to make transfers of stock. Section 32.

And the 33rd section contains an indemnity for acts done pursuant to the Act. Section 33.

BILLS FOR REMOVAL OF TRUSTEES.

*Bill by Cestui que Trusts against Trustees praying their Removal,
on the ground of the advanced Age of one, and mental Incapacity
of the other.*

To the, &c.

In Chancery.

HUMBLY complaining, shew unto your Lordship, your suppliants, Hannah Allen, otherwise Jones, widow of Luke Allen, late of, &c., deceased, Anna Allen and Augusta Allen, the children of the said Luke Allen and your suppliant, Hannah, both infants under the age of twenty-one years, by your suppliant, Hannah Allen, their mother and next friend, and Luke Allen, the younger, Esquire, the eldest son of the said Luke Allen, the elder, and your suppliant, Hannah, who hath attained his age of twenty-one years.

By deed of
28th June,
1799,

That by indenture bearing date on or about the 28th day of June, 1799, and made between the said Luke Allen, the elder, of the first part; your suppliant, Hannah Allen, by her then name of Hannah Jones, of the second part; Anne Jones, of, &c., widow, since deceased, the mother of your suppliant, Hannah, of the third part; Richard Jones, of, &c., of the fourth part; Hubert Allen, of, &c., of the fifth part; and John Roche, of, &c., and James Mitchell, of, &c., merchant, acting executor of John Fitzgerald, Esquire, deceased, of the sixth part, reciting that a marriage was then intended between the said Luke Allen, the elder, and your suppliant, Hannah; and that your suppliant, Hannah, was entitled, under the will of the said John Fitzgerald, bearing date the 17th day of February, 1791, to a sum of £6000 of the then currency of Ireland, and to a further sum of £6000, as the only surviving sister of Johanna Jones, de-

ceased, who died a minor, intestate, unmarried, and without issue, but subject to the limitations in said will mentioned, and reciting that it was agreed upon between the said Luke Allen the elder, and your suppliant, Hannah, that the fortune of your suppliant, Hannah, should, in consideration of said marriage, be assigned to the said John Roche and James Mitchell, their executors, administrators, and assigns, upon the trusts thereafter mentioned.

In consideration of the said marriage, and for the other considerations therein mentioned, your suppliant, Hannah, with the consent and approbation of the said Luke Allen the elder, did assign, transfer, and set over unto the said John Roche and James Mitchell the said two principal sums of £6000 and £6000, making together £12000, with all interest due or to accrue due thereon respectively.

plaintiff Hannah assigned two sums of £6000 each, to Roche and Mitchell,

To hold the same unto the said John Roche and James Mitchell, and the survivor of them, and the executors or administrators of such survivor, upon the trusts, and to and for the uses, intents, and purposes thereafter and in part hereinafter mentioned, that is to say, upon trust, after the solemnization of said marriage, to call in the said sum of £12000, and all interest due thereon, from the person or persons then liable to pay the same, and to invest the same to the best advantage, in Government securities, to be approved of by your suppliant Hannah, notwithstanding her coverture, testified as therein mentioned, in the names of the said John Roche and James Mitchell, or the survivor of them, and the executors and administrators of such survivor, and to pay unto, or otherwise permit and suffer your suppliant, Hannah Allen, or her assigns, to receive and take the clear yearly interest thereof during the life-time of the said Luke Allen, the elder, notwithstanding her coverture, for her sole and separate use and support, without the control of the said Luke Allen, the elder, and without being liable to his debts or engagements ;

upon trust,

to invest same with consent of Hannah,

in names of trustees,

in trust for Hannah for life for her separate use ;

And after the decease of your suppliant, Hannah Allen, as to £4000, part of the said sum of £12000, upon the trusts, and for the intents and purposes in and by the said will of the said John Fitzgerald limited, declared, and appointed concerning the said sum of £4000, that is to say, that in case your suppliant, Hannah Allen, should depart this life without leaving lawful issue living at her death, then upon trust, as to said sum of £4000, to be paid to the younger child

remainder as to £4000, :

in case Hannah should die without issue,

upon trusts of John Fitzgerald's will,

and subject
thereto as to
the entire
£12,000, in
trust for the
children of said
marriage.

Said deed did
not contain a
power to
changetrustees.

Marriage took
effect.
Issue of said
marriage

entitled to
£12,000 on
their mother's
death.

After marriage
trustees pro-
ceeded to call
in securities.

Roche survived
his co-trustee.

By decretal
order of 22nd
April, 1814,

or children of the said Richard Jones, subject to the appointment of your suppliant Hannah; and in case your suppliant, Hannah Allen, should leave one or more children of the said then intended marriage living at her death, then to stand possessed of the entire of said sum of £12,000, upon such trusts, for the benefit of the children of the said then intended marriage, as are in the said indenture of settlement particularly mentioned; but the said indenture contained no power or authority to appoint a new trustee in the place or stead of either of the said trustees therein named, who should die, or decline, or be or become incapable to act in the said trusts, or be desirous of being removed therefrom.

As in and by the said indenture, in your suppliant Hannah's possession, ready to be produced and proved, reference being thereto had, will more fully appear.

And your suppliants further shew unto your Lordship, that the said intended marriage was soon afterwards had and solemnized between the said Luke Allen, the elder, and your suppliant, Hannah; and that your suppliants, Luke Allen, the younger, Augusta Allen, and Anna Allen, are the only children of the said marriage.

And your suppliants further shew, that your suppliants, Luke Allen the younger, Augusta Allen, and Anna Allen will be entitled to the said sum of £12,000, on the decease of your suppliant, Hannah Allen.

Your suppliants further shew, that after the solemnization of said marriage, the said John Roche and James Mitchell proceeded to call in the securities in which the said sum of £12,000 was vested, and several proceedings were had for that purpose.

Your suppliants further shew, that the said James Mitchell afterwards died, leaving the said John Roche the surviving trustee in said settlement of the 28th day of June, 1799.

Your suppliants further shew unto your Lordship, that by a decretal order, bearing date the 22nd day of April, 1814, made in a certain cause pending in this honourable Court, wherein the said Luke Allen, the elder, and your suppliant, Hannah, were complainants, and Eleanor Poole, otherwise Mitchell, sole executrix of the said James Mitchell, the said Richard Jones, heir-at-law and devisee of the said John Fitzgerald, deceased, James Jones and John Jones, minors, sons of the said Richard,

John Roche, and Anne Jones, widow, who, after the death of the said James Mitchell, obtained probate as one of the executors of said John Fitzgerald, deceased, were defendants, it was ordered, adjudged, and decreed by the Right Honourable the Lord Chancellor of Ireland, that the Right Honourable Arthur James Earl of Fingal, and Gerald Arthur, two of the defendants hereinafter named, should be, and they were thereby declared trustees for your suppliants, in the place and stead of the defendant, John Roche, the surviving trustee in said indenture of settlement of the 28th day of June, 1799, in said decree and hereinbefore mentioned, to carry into execution the several trusts thereof, and that the execution thereof should be, and the same was accordingly thereby decreed to them. And it was further ordered, adjudged, and decreed, that the said John Roche, the surviving trustee in the said deed of settlement named, should be, and he was thereby discharged from the several trusts, powers, and authorities vested in him, or intended so to be, by the said deed of settlement. And it was further ordered, that the said John Roche should execute all proper deeds and conveyances for transferring the several trusts, estates, powers, and authorities in him vested by the said deed of settlement, unto the said Arthur James Earl of Fingal, and Gerald Arthur, the said new trustees thereby decreed and appointed, as aforesaid; as by the said decree remaining of record in this honourable Court, reference being, &c.

Lord Fingal and Gerald Arthur were appointed trustees in room of Roche.

Your suppliants further shew unto your Lordship, that pursuant to said decree, the said John Roche, by a certain deed by him duly executed, and bearing date the 10th day of, &c., transferred and made over the several trust estates and monies in him vested by said indenture of the 28th day of June, 1799, unto the said Arthur James Earl of Fingal, and Gerald Arthur, who thenceforth continued to act in the premises as trustees, in the place and stead of the said John Roche.

Your suppliants further shew unto your Lordship, that the said Gerald Arthur is disabled by incapacity from further acting in the trusts of said settlement, being a person of unsound mind, but no commission of lunacy has issued against him; and the said Arthur James Earl of Fingal, by reason of his advanced age, declines to act farther in the trusts of said indenture, and is desirous to be dis-

Gerald Arthur of unsound mind, and Lord Fingal declines trust from his advanced age.

charged therefrom, but by reason that no power is reserved in the said indenture for the appointment of a new trustee, your suppliants are advised that the said Arthur James Earl of Fingal and Gerald Arthur cannot be discharged from said trusts, nor any new trustees appointed without the aid of this honourable Court, and your suppliants shew, that James Jones and John Jones, the only younger children of said Richard Jones, claim an interest in the said sum of £4000, in case your suppliant, Hannah, shall die without leaving issue.

Combination.

But now so it is, may it please your Lordship, that the said Arthur James Earl of Fingal, acting in concert with the said Gerald Arthur, and the said Gerald Arthur combining and confederating together with the said James Jones and John Jones, and to and with divers other persons at present unknown to your suppliants, whose names, when discovered, your suppliants pray they may be at liberty to insert herein, with apt words to charge them as parties defendants hereto, and contriving how to wrong and injure your suppliants in the premises, refuse to do your suppliants any manner of justice in the premises.

All which actings, &c. In consideration, &c. (*ante*, p. 18).

Interrogating
part.

To the end, therefore, that the said defendants may, if they can, shew why your suppliants should not have the relief hereby prayed, and that the said Arthur James Earl of Fingal may, upon his protestation of honour, and the said Gerald Arthur may, upon his corporal oath, to the best and utmost of their several and respective remembrance, information, and belief, full, true, direct, and perfect answer make to such of these several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say :

1. Whether such indenture of settlement as hereinbefore mentioned to bear date the 28th day of June, 1799, was not entered into upon the occasion, and between the parties, and was not of such date, purport, and effect respectively, as hereinbefore mentioned ?

2. Whether said marriage between the said Luke Allen, the elder, and your suppliant, Hannah, did not take effect about the time hereinbefore mentioned, and whether your suppliants, Luke Allen the younger, Augusta Allen, and Anna Allen, are not the only children of the said marriage, and are not entitled, subject as here-

inbefore mentioned, to the said sum of £12,000, or some other and what sum, expectant on the decease of your suppliant, Hannah, or how otherwise ?

3. Whether, after the solemnization of the said marriage, the said John Roche and James Mitchell did not proceed to call in the securities in which the said sum of £12,000 was vested ?

4. Whether the said James Mitchell did not afterwards die, leaving the said John Roche, his co-trustee, him surviving ?

5. Whether such decretal order as hereinbefore mentioned to bear date the 22nd day of April, 1814, was not made and pronounced, and whether same was not of the purport and effect hereinbefore set forth, or how otherwise ?

6. Whether, pursuant to said decretal order, the said John Roche did not, by indenture of assignment by him duly executed, of such date as hereinbefore mentioned, transfer and make over the several trust estates and monies in him vested by said indenture of the 28th day of June, 1799, unto the said Arthur James Earl of Fingal, and Gerald Arthur, and whether the said Arthur James Earl of Fingal and Gerald Arthur did not thereupon enter upon the execution of the trusts of said indenture of the 28th day of June, 1799, and continue to act therein until the present time, or how otherwise ?

7. Whether the said Gerald Arthur is not a person of unsound mind, and incapable of farther acting in the trusts of said last-mentioned indenture, or how otherwise ?

8. Whether the said Arthur James Earl of Fingal is not, by reason of his advanced age, or for some other and what cause, desirous of being removed from the trusts of said indenture of the 28th day of June, 1799, or how otherwise ?

9. Whether there is any power reserved or contained in said last-mentioned indenture for the appointment of a new trustee, and whether the said Arthur James Earl of Fingal and Gerald Arthur can be discharged from the trusts of said indenture without the aid of this honourable Court ?

10. Whether the defendants, James Jones and John Jones, are not the only younger children of the said Richard Jones, and whether they do not claim an interest in the said sum of £4000, in case your suppliant, Hannah, should die without leaving issue, or how otherwise ?

Prayer.

Reference to
appoint new
trustees.

Transfer of
trust funds to
new trustees.

And that the said defendants may answer the premises, and that it may be referred to one of the Masters of this honourable Court to appoint new trustees under the said marriage settlement, in the place and stead of the said Arthur James Earl of Fingal, and the said Gerald Arthur; and that the said defendants may be directed to join in such instrument or instruments as may be necessary for assigning or vesting the said trust premises to or in such new trustees, upon the trusts of said settlement; and that thereupon the said defendants, Lord Fingal and Gerald Arthur, may be discharged from the trusts of said indenture.

[Pray letter missive and subpoena against Lord Fingal, and subpoena against the defendant, Gerald Arthur, and pray that James Jones and John Jones, upon being served with the notice mentioned in the 15th General Order, may be bound, as ante, p. 310].

The defendants, Lord Fingal and Gerald Arthur, are required to answer the interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.

Bill by Cestui que Trust to remove Trustees.

To the, &c.

In Chancery.

Humbly complaining shew unto your Lordship, your suppliants, John Jones, of, &c., and Sarah, his wife, and Jane Jones, their daughter and only child, an infant under the age of twenty-one years, by the said John Jones, her father and next friend.

By deed of
settlement trust
funds assigned
to Thompson
and Styles, upon
trust for plain-
tiffs.

Misapplication
of trust fund by
Thompson.

That by indenture, &c. *[State deed of settlement, whereby the trust property was assigned to William Thompson and John Styles, upon trust for plaintiffs and the issue of the marriage].*

As by said indenture, &c.

Your suppliants further shew unto your Lordship, that the said William Thompson hath principally acted in the trusts of the said indenture, and hath by virtue thereof, from time to time, received

considerable sums of money and other effects, but the said William Thompson hath applied only a small part thereof upon the trusts of the said indenture, and hath converted the residue thereof to his own use. And the said John Styles declines to interfere with the said trust funds, or to prevent the misapplication thereof by the said William Thompson.

Your suppliants further shew, that they have by themselves and their agents, &c. [*State applications to trustees for an account of the trust property received and possessed by them, and of their application thereof, and refusals, and proceed thus*]: And the said defendants pretend that the trust property and effects possessed and received by them were to an inconsiderable amount, and that they have duly applied the same upon the trusts of the aforesaid indenture.

Applications
and refusals.

Pretence that
trust property
small and duly
applied.

Whereas your suppliants charge the contrary of such pretences to be the truth, and that so it would appear if the said defendants would set forth, as they ought to do, a full and true account of all and every the said trust property and effects which they have respectively possessed and received, and of their application thereof.

Charge the con-
trary.

And your suppliants charge that the said William Thompson threatens and intends to use other parts of the said trust property, and to apply the same to his own use, unless he is restrained therefrom by the injunction of this honourable Court.

Charge that
Thompson in-
tends to apply
more of the
property to his
own use.

And your suppliants further charge that the said William Thompson, and also the said John Styles, ought to be removed from being trustees under the said indenture, and that some other persons ought to be appointed by this honourable Court as such trustees in their place and stead, and that in the meantime some proper person ought to be appointed to receive and collect the said trust property.

All which actings, &c. (*ante*, p. 18).

To the end, &c. (*ante*, p. 309). [*Interrogate to the statements, charges, and pretences, and as to the particulars and amount of the trust property, and proceed thus*]:

Interrogating
part.

And that the said defendants may answer the premises; and that an account may be taken of all and every the said trust property and effects which have, or, but for the wilful default and neglect of the said defendants, might have been received by them, or either of them, or by any other person or persons by their or either of their

Prayer.
Account of
trust funds,

and of the application thereof;

that old trustees be removed;

and new trustees may be appointed.

Transfer of trust funds to new trustees.

Receiver.

Injunction.

order, or to their or either of their use; and also an account of the application thereof; and that the said defendants may respectively be decreed to pay what shall appear to be due from them upon such account; and that the said defendants may be removed from being trustees under the said indenture; and that it may be referred to one of the Masters of this honourable Court to appoint two other persons to be the trustees under said indenture in their place and stead; and that the said defendants may be directed to transfer and assign the trust funds to the new trustees when appointed, and that in the meantime some proper person may be appointed to receive and collect the said trust estate and effects, and that the said defendants may be restrained, by the order and injunction of this honourable Court, from further interfering therein. [*And for further relief, &c.*]

Prayer of Bill by Cestui que Trust for Removal of Trustees, and new Appointment.—Short Form.

Prayer.

And that the said defendants may be removed from being trustees under the said indenture; and that it may be referred to one of the Masters of this honourable Court to appoint two other persons to be trustees under the said indenture in their place and stead, and that the said defendants may be directed to join in such instrument or instruments as may be necessary for conveying or assigning the said trust premises to such new trustees, upon the trusts of the said indenture. [*And for further relief, &c.*]

Prayer of Bill for the Purpose of following trust Estate improperly conveyed away.

[*State the marriage articles under which the plaintiff claims ; that marriage took effect, and plaintiffs are issue thereof, and the conveyance executed by the settlor to the defendant. State death of settlor, whereby his life estate under the articles terminated*].

And that the defendant may answer the premises ; and that the said marriage articles may be carried into execution, and the trusts thereof performed by and under the decree of this honourable Court, and that it may be declared that the conveyance to the said defendant ought not to defeat or affect the plaintiff's rights under the said articles ; and that the said defendant may be decreed to convey the said lands to such persons as your Lordship shall appoint, upon the trusts contained in the said marriage articles.

Prayer.
That trusts be performed,
notwithstanding conveyance.
That defendant may convey to new trustees.

And that an account may be taken from the time of the death of your suppliant's said father, of the rents and profits of the lands and premises comprised in the said marriage articles, and which were so as aforesaid conveyed to the said defendant ; and that the defendant may be decreed to pay to your suppliant such sum as, upon the taking said account, shall be found to be due to him. [*And for a Receiver, and general relief, &c.*]

Account of rents since death of plaintiff's father.

Prayer of a Bill by Cestui que Trust to remove Trustees, and compel them to replace the Trust Fund.

And that the said defendants, John Jones and William Styles, may be removed from being trustees under the said indenture of settlement ; and that they may be decreed by this honourable Court to replace all such parts of the said trust stock as have at any time been sold out or transferred by them ; and that they may be restrained by the injunction of this honourable Court from selling or

Prayer.

transferring any part of the said residue of the said £500 3½ *per cent.* consolidated bank annuities, now standing in their names; and that new trustees may be appointed by and under the direction of this honourable Court, in the room of the said defendants, John Jones and William Styles, and that they may be directed to transfer the said sum of £500 3½ *per cent.* consolidated bank annuities to such new trustees as this honourable Court shall direct, and that the dividends thereof may be paid to the said [*cestui que trust*], or his assigns, during his life, and after his death, according to the trusts of the said settlement. [*And for further relief, &c.*]

Prayer of a Bill by Cestui que Trust against his Trustee to restrain him from improperly negotiating or suing upon a Bill of Exchange.

That defendant be decreed to deliver bill of exchange to plaintiff.

Injunction from proceeding thereon, or negotiating.

And that the defendant may answer the premises; and that the said defendant may be decreed to deliver up to your suppliant the said bill of exchange, and may be restrained from proceeding with the action so as aforesaid commenced by him for recovery of the amount thereof; and that the said defendant may also be restrained from negotiating the said bill, or commencing any other action upon the same. [*Pray injunction and general relief*].

See *Balls v. Strutt*, 1 Hare, 146; 1 Van Heyth. 441.

Prayer of Bill by Cestui que Trust to compel a Trustee to act in Performance of the Trust.

[*State the settlement whereby, in consideration of marriage, &c., the lady's father covenanted to pay the trustee a sum of £1000 as*

his daughter's portion, and whereby it was declared that the trustee should stand possessed of said debt of £1000, upon trust to compel payment thereof, and when paid, to invest in Government security, and pay the interest or dividends to wife for life, and after her death to husband for life, and after decease of survivor, to divide the principal among the children of the marriage: state that marriage took effect, and there are issue thereof three children; application by husband and wife to the trustee to enforce payment of said sum of £1000, to be invested according to trusts of settlement; refusals, on the ground that plaintiff declines to indemnify. Interrogate to stating and charging parts of bill, and proceed as follows]:

And that the said defendant [*trustee*] may answer the premises.

Prayer.

And that the said defendant may be compelled by a decree of this honourable Court, to call in the said sum of £1000, and to enforce the payment thereof by the said [*father*], pursuant to his covenant contained in the said marriage settlement, and to invest the said sum of £1000, when paid, pursuant to the directions contained in the said settlement, and to pay and apply the interest and produce thereof according to the trusts so as aforesaid declared of and concerning the same; and that the said defendant may be directed to pay your suppliant the costs of this suit [*and for further relief*]. [*Wife sole plaintiff, by her next friend; husband, children, and trustee, defendants*].

The defendant be compelled to enforce payment of trust fund, and to invest,

and apply interest, according to trust.

See Kirby v. Mash, 3 Y. & Col. (Ex.) 295; Wake v. Parker, 2 Keen, 59; Sweeny v. Hall, 1 Ir. Eq. R. 22, ante, p. 4; Thorby v. Yeats, 1 Y. & Col. C. C. 438; England v. Downs, 1 Beav. 96; Ring v. Nettles, 3 Ir. Eq. R. 53; Hackett v. Farrell, 4 Ir. Eq. R. 515.

Bill by a Trustee for the Removal of his Co-Trustee refusing to act under the Trusts of a Will, and for the Appointment of a new Trustee in his place.

[*Bill states the will, devising real estate to plaintiff and defendant, William Thompson, on trust to sell; testator's death, and the*

probate; that the personal estate is insufficient, and that it is therefore necessary to sell the whole or part of the real estate, pursuant to the directions of the will. Applications by plaintiff to the defendant, who was named a trustee in the will, to join with plaintiff in carrying the trusts of the will into execution, and for that purpose to sell the testator's estates to pay off his debts, and otherwise to act in the trusts reposed in them by the will.

That the defendant refuses to act in the trusts of the will, and therefore plaintiff is advised, and humbly insists that the said William Thompson ought to release and assign all his trust estate and interest in the said premises unto plaintiff, his co-trustee; or otherwise, that a new trustee ought to be appointed in the place of the said William Thompson, and that the said trust estate ought to be conveyed unto plaintiff and such new trustee, upon the trusts mentioned in the said will. But the said William Thompson refuses to assign or convey the trust estates and premises, or any part thereof, alleging that he cannot do so with safety to himself, without the direction of the Court, &c.]

Prayer.

And that the said William Thompson may be discharged from the trusts of the said will, and may release and convey all his interest in the said trust estates and premises, according to the nature thereof, unto your suppliant, his co-trustee; or that a new trustee may be appointed in the place and stead of the said William Thompson; and that the trust estates and premises may be respectively duly conveyed and assigned, according to the different natures thereof, unto your suppliant and such new trustee, and their heirs, upon the trusts mentioned and expressed in the said testator's will; and that all proper parties may be decreed to join therein; and that the new trustee may be empowered to act with your suppliant, according to and in conformity with the trusts created by and specified in the said will of the said testator [*and for further relief, &c.*]

Prayer of Bill by surviving Trustee praying to be discharged from the Trusts of a Will, on the Ground of Obstruction by the Husband of Cestui que Trust, and for the Appointment of new Trustees ; and for an Account of the Rents improperly received by the Husband ; and for an injunction to restrain him from proceeding at law against the Tenants, and from receiving any further Rents ; and for a Receiver in the meantime.

And that an account may be taken by and under the direction and decree of this honourable Court, of the rents and profits of the said trust estates received by the said defendant [*the husband of cestui que trust*], or any other person or persons, by his order, or for his use ; and that what shall be found due from him on the balance of such account, may be paid by him to your suppliant, to be applied and disposed of upon the trusts, and for the purposes in the said testator's will declared and expressed concerning the same ; and that your suppliant may be discharged from the trusts of the said testator's will, upon passing his accounts, which your suppliant is ready and willing, and hereby submits to do, in such manner as this honourable Court shall please to direct ; and that it may be referred to one of the Masters of this honourable Court to approve of two or more fit persons to be trustees of the said trust estates, funds, and premises, in the place and stead of your suppliant ; and that your suppliant may be at liberty to assign, transfer, and convey the said trust estates and premises unto such new trustees when approved of by this honourable Court. And that your suppliant may be indemnified in so doing by the order and directions of this Court, and may be allowed to retain, out of the trust monies now in his hands, or which shall hereafter come to his hands, all and every his reasonable costs and charges in and about the premises, or that he may be paid the same by the defendant [*the husband*] ; and that in the meantime some proper person may be appointed by this honourable Court, to receive the rents and profits of the said trust estates ; and that all proper and necessary directions may be given in the premises ; and that the said [*husband*] may be restrained by the order and injunction of this honourable Court, from all further and other proceedings at law against the tenants of the said trust estates, or any of them, and from any further receipt of the rents and profits

Prayer.
Account of
rents of trust
estate received
by defendant.

Removal of
plaintiff,
on passing his
account.

Appointment of
new trustees.

Plaintiff's costs
to be retained
by him, or paid
to him.

Receiver.

Injunction.

thereof, or otherwise intermeddling with the said trust estates, monies, and premises [*and for further relief, &c.*]

Prayer of Bill by Trustee for his Discharge.

Prayer.

That plaintiff be removed on passing his accounts.

Reference to approve of new trustee.

That trust premises be conveyed to new trustee.

Plaintiff indemnified.

And that your suppliant may be discharged from the trusts of the said testator's will and codicil, upon passing his accounts, which your suppliant is ready, and hereby submits to do, in such manner as this honourable Court shall direct; and that it may be referred to one of the Masters of this honourable Court, to approve of some proper person to be trustee of the said trust estates, funds, and premises, in the place and stead of your suppliant; and that your suppliant may be at liberty to assign, transfer, and convey the said trust estates and premises unto such new trustee when approved by this honourable Court; and that your suppliant may be indemnified in so doing, by the order and directions of this honourable Court [*and for further relief, &c.*]

Bill to carry into Effect the Trusts of a Will directing a Settlement, and to recover Possession of the Trust Estate.

To the, &c.

In Chancery.

Testator,
Anthony Malone, being
seised of acquired estate,

Humbly complaining, sheweth unto your Lordship, your suppliant John Malone, of, &c., that the Right Honourable Anthony Malone, formerly of *Baronstown*, in the county of Westmeath, deceased, was, in and previously to the month of July, in the year 1774, seised in fee simple of and in real estates, to a very considerable amount and value, of his own purchase and acquisition, over

which he had absolute control, and full power of disposal, that is to say, of and in ALL THAT AND THOSE, the towns and lands of, &c., subject to a mortgage thereof, made by the said Anthony Malone, by deed bearing date the 6th day of June, 1767, for securing £1000, with interest, to the Rev. Edward Ledwidge and William Ruxton, in said deed of mortgage named.

Your suppliant further sheweth unto your Lordship, that in and previously to the said month of July, in the said year 1774, the said Right Honourable Anthony Malone, under and by virtue of the settlement executed upon his marriage, and bearing date on or about the 30th day of June, 1773, and under and by virtue of the will of his father, Richard Malone, deceased, was seised for the term of his natural life, with remainder in tail male to his nephew, Richard Malone, afterwards Lord Sunderlin, of and in ALL THAT AND THOSE, the towns and lands of, &c. and of paternal estate,

Your suppliant further sheweth unto your Lordship, that all the said estates whereof the said Right Honourable Anthony Malone was so seised as aforesaid by virtue of the provisions of his said marriage settlement, and of the said will of his said father, the said Richard Malone, deceased, had been the estates of his said father, and were therefore considered and usually called and denominated by the said Right Honourable Anthony Malone, as his paternal estates.

Your suppliant further sheweth that the said Right Honourable Anthony Malone, in and previously to the said month of July, in the said year 1774, and at the time of his decease, was possessed of a considerable personal estate and fortune, and being so seised and possessed, he, the said Right Honourable Anthony Malone, on or about the 12th day of July, 1774, duly made and published his last will and testament in writing, duly executed and attested for passing real property, and thereby, after bequeathing and devising some legacies and rent-charges, and after charging the same upon the said estates of the said testator's own purchase and acquisition, and of which he was, at the time of his death, seised in fee simple, he, the said testator, devised the said estates of which he had the power to dispose, in the words and figures following, that is to say : " It is my will, and I do accordingly devise all my real and freehold estates of my own purchase or acquisition, or over which I have any power or dominion and possessed of personal estate,
12th July, 1774, made his will,
devising to his nephew, Richard Malone, Lord Sunderlin,

in these words:

enabling me to dispose thereof, situate in the counties of Westmeath, Roscommon, Longford, Cavan, and county of the city of Dublin, or elsewhere in the kingdom of Ireland, unto my said nephew, Richard Malone, the eldest son and heir of my lately deceased brother, Edmund Malone, in whom I place the utmost confidence, his heirs and assigns for ever, not entertaining the least doubt but that he will, in due time, and upon the first proper occasion, take care not only to have the said estates so devised to him by me, but my paternal estate settled in such manner that the said estates may continue in the male line of our family, and in our name and blood, and go to the several branches of it in succession, one after another, according to their priority of birth and seniority of age, the elder and his issue male being always preferred to the younger and his issue male, according to the usual course of family settlements, as by the rules of law the same may be properly done; and I do hereby most earnestly recommend it to my said nephew to see the same so settled, still reserving to himself and limiting to all the male branches of our family to whom estates only for life shall be limited in remainder or succession, all such proper and reasonable powers as are usually given and attendant upon such limited estates, in order to enable him and them, as they shall be respectively seised in possession, to settle jointures upon their wives, or such women as they shall happen to marry, and to provide for their younger children, or for their daughters, if they shall happen to have daughters only, and no issue male, and to make leases for reasonable limited terms, when they shall be respectively seised and in actual possession by virtue of any remainder that shall be so limited to them respectively, and all such other reasonable powers as my said nephew may think fit, necessary, or expedient to add, in order to guard against the consequences of unforeseen accidents or events; and I do hereby appoint my said nephew, Richard Malone, sole executor of this my will, and request he will take upon himself the execution thereof, and the performance of the trusts hereby reposed in him;" as in and by said will, when produced, will more fully appear.

and appointed
his said nephew
executor,

and died,

Your suppliant further sheweth unto your Lordship, that the said testator, Anthony Malone, about two years after making his said will, that is to say, on or about the 8th day of May, 1776, departed this life without having altered or revoked the same, and seised of

the estates thereby devised, and thereupon his said nephew and devisee, the said Richard Malone, afterwards Lord Sunderlin, entered immediately into the seisin and enjoyment as well of the said testator's acquired estates as of his paternal real estates, and also possessed himself of the entire of the said testator's personal estate, and took upon himself the burthen of the execution of the said will, and of the several trusts thereby reposed in him, and obtained probate of the said will forth of Her Majesty's Court of Prerogative in Ireland.

leaving his devisee his heir, who entered into possession,

and proved the will.

Your suppliant further sheweth, that the annual income produced by the estates described by the said testator, in his said will, as his paternal estates, did not, at the date of the said will, and of the death of said testator, exceed the sum of £2000 *per annum*, whereas the income produced by the estates thereby described as the said testator's acquired estates, and which were all of said testator's own purchase and acquisition, amounted at the said respective periods to about the sum of £4500 *per annum*.

Value of the estates.

Your suppliant further sheweth unto your Lordship, that it plainly appears to have been the object and intention of said testator that the entire of said real estates, consisting as well of the acquired as of the paternal estates, should be limited to the several male branches of his family in succession, according to their priority of birth, so as to continue in the male line of his family, and in his name and blood, as far and as widely as the rules of law would permit; that inasmuch as the said testator had the absolute control over his said acquired estates, he might have disposed of same as he pleased, and might have annexed to the devise thereof any and what conditions he thought proper; and that the said testator, by his said will having taken notice of such his power of disposal over his acquired estates, and having devised the same to his said nephew as a person in whom he placed confidence, not doubting that he would have the said paternal estates, as well as the said acquired estates of said testator, settled in such manner as to effectuate the said testator's object and intention with respect to the same, as declared in his said will, the said Richard Malone, as devisee in said will, thereby became bound to elect whether he would accept the devise so made to him, subject to the trusts and upon the terms so expressed and signified in said will as to testator's paternal estates,

Plaintiff's construction of the will.

as well as to his said acquired estates, or whether he would forego any benefit under said will, and give up the real and personal property thereby devised and bequeathed to him, and insist on his title to the said paternal estates, uncontrolled by the terms of said will; and your suppliant sheweth that the said Richard Lord Sunderlin, by taking possession as well of the acquired and paternal estates, as also of the entire of the personal property of the said Right Honourable Anthony Malone, by the said will so devised and bequeathed to him, and by accepting the benefits conferred upon him by said will, must be taken to have made such his election, and to have adopted the entire of said will, so as to be bound to give effect to every part thereof, and to carry into execution the intention of the said testator, as appearing upon the face thereof: and your suppliant sheweth, that the said Richard Lord Sunderlin did in fact make such election, and did adopt the entire of said will and all its provisions, and that, in consequence thereof, he became bound to conform to all its provisions, and effectuate the same, so far as was in his power, and to renounce every right inconsistent with it, and therefore your suppliant submits that the said Richard Lord Sunderlin took the acquired estates of the said Anthony Malone, the testator, not only subject to the annuities and rent-charges expressly charged thereon by the said will, but also subject to the condition or trust that he would settle, in a legal and effectual manner, both the said acquired estates and the said paternal estates, in the mode directed and pointed out by the said Anthony in his said will, and that the said Richard Lord Sunderlin, having, under the will of the said testator, entered into possession of the said estates thereby devised to him, was liable to and bound to perform the trusts of the said will, in regard not only to the said acquired estates of the said testator, but also to the estates which are described in the said will as the said testator's paternal estates.

Male branches
of testator's
family living at
his death.

Your suppliant further sheweth unto your Lordship, that the said testator Anthony Malone, at the time of his death, left of the male line of his family and of his name and blood, the persons following, and none other, to whom, as having been living at the death of the said Anthony, your suppliant submits, that, according to the directions in the will of the said Anthony, estates for life should have been successively limited, with remainders respectively to their first

and other sons in succession in tail male, that is to say, the said Richard Malone, afterwards Lord Sunderlin, and Edmund Malone, the sons of testator's eldest brother Edmund, deceased; Henry Malone, Richard Malone, and Anthony Malone, the sons of Richard Malone, the testator's younger brother, and Richard Malone, grandson of the testator's said brother Richard, and only son of the said Henry Malone, the eldest son of said testator's brother Richard.

Your suppliant further sheweth unto your Lordship, that within a few months after the decease of the said testator, the said Edmund Malone, the brother of said Richard Malone, the said devisee, applied to his brother, the said Richard, afterwards Lord Sunderlin, insisting that the said Richard was entitled, under said will of said testator, to a beneficial estate in the said several lands, for his own life only, and that as to the inheritance of all said lands and premises herein-before mentioned, he, the said Richard Lord Sunderlin, was merely a trustee for the purpose of making such settlement of all said lands as was directed by the said will of the said Anthony, and that under such a settlement, he, the said Edmund, would be the person next in remainder after the said Richard his brother, and as such entitled, after the death of the said Richard Lord Sunderlin without issue male, to a life estate in the entire of said lands and premises.

Edmund Malone, the person entitled under the will in remainder expectant on the death of Lord Sunderlin without male issue, required a settlement,

And your suppliant further sheweth, that the said Lord Sunderlin, upon such application being made by the said Edmund, in order to prevent the said Edmund from taking effectual proceedings to enforce the execution of such settlement as was directed by the said will of the said Anthony, entered into a compromise with his brother the said Edmund Malone, and accordingly it was agreed that he, the said Richard Lord Sunderlin, should release the lands of *Shinglass*, the estate of the said Edmund, from a sum of £5416 13s. 4d. charged thereon for the benefit of said Richard Lord Sunderlin, and that he, the said Richard Lord Sunderlin, should moreover suffer a recovery of the lands of *Tonemegarah* and *Cumlin*, in the County of Cavan, being part of the paternal estate of the said testator, Anthony Malone, whereof the said testator, Anthony, had been seised for his life with remainder in tail to the said Richard Lord Sunderlin. And it was further agreed that the said Richard Lord

but accepted a compromise.

Sunderlin, after acquiring the fee of said lands by virtue of such recovery, should convey the fee simple thereof to the said Edmund Malone, and his heirs for ever, and should put the said Edmund into immediate possession of said lands, the value whereof exceeded the sum of £500 *per annum*.

Your suppliant further sheweth, that in pursuance of such agreement, the said Richard Lord Sunderlin, by indenture bearing date on or about the 18th day of July, 1777, did release the said lands of *Shinglass* of and from the said sum of £5416 13s. 4d., so as afore-said charged thereon; and in further performance of said agreement, he, the said Lord Sunderlin, did, in or as of Trinity Term, in the year 1777, being the year next after the decease of the said testator, suffer a common recovery of the said lands of *Tonemegarah* and *Cumlin*, in the County of Cavan, by virtue of which recovery the said Richard Lord Sunderlin became seised in fee of said lands, subject, nevertheless, as your suppliant submits, to the trusts in the will of the said testator expressed and declared of and concerning the estates in the said will described as the said testator's paternal estates.

Your suppliant further sheweth, that instead of making a settlement of said lands, as directed by the said will, he, the said Richard Lord Sunderlin, in pursuance of his said arrangement with his said brother Edmund, by deed bearing date the 17th day of June, 1777, and made between the said Richard Lord Sunderlin, then Richard Malone, of the one part, and the said Edmund Malone, brother of the said Richard Lord Sunderlin, of the other part, granted and conveyed the said lands of *Tonemegarah* and *Cumlin*, unto the said Edmund Malone, his heirs and assigns for ever, by virtue of which conveyance the said Edmund became seised and possessed of the said lands, and continued in possession thereof until his death, which happened about the month of May, 1812.

Your suppliant further sheweth, that the said Edmund Malone died without issue, but by his last will devised the said lands of *Tonemegarah* and *Cumlin* to his brother, the said Lord Sunderlin, for his life, with remainder, after his decease, to his sisters, Henrietta Malone and Catharine Malone, in common, and to their heirs and assigns.

Your suppliant further sheweth, that the said Richard Lord Sunderlin having, by the said arrangement with his said brother Edmund, in the year 1777, secured the acquiescence of the person then most interested in carrying into execution the trusts of the will of the said testator, proceeded to deal with the residue of the estates therein mentioned, as if such will had never been made, and accordingly the said Lord Sunderlin being so seised in tail male of the said several lands and premises situate in the counties of Westmeath and Longford, being part of the lands described by the said will of the said testator as his paternal estates, did, as of Trinity Term, 1781, suffer a common recovery of ALL THAT AND THOSE the lands of, &c., being part of the estates hereinbefore mentioned as described in the will of the said Anthony Malone as the said testator's paternal estates.

After which, Lord Sunderlin suffered recoveries of the paternal estate;

Your suppliant further sheweth, that under and by virtue of said two several recoveries, the said Lord Sunderlin acquired the fee of the said testator's said paternal estates, subject nevertheless, as your suppliant submits, to the trusts declared in the will of the said testator, Anthony Malone, of and concerning the same.

Your suppliant further sheweth, that the said Richard Lord Sunderlin, instead of executing such settlement as was directed by the said will, did, by deed by him executed, and bearing date on or about the 24th day of September, 1784, in consideration of the sum of £15000, grant and assign to Sir Nicholas Lawless, afterwards Lord Cloncurry, his executors, administrators, and assigns, all the said lands of which the said Richard Lord Sunderlin had so as aforesaid acquired the fee simple, to hold to the said Lord Cloncurry for 1000 years, subject to redemption upon payment of the sum of £15000, with interest, as therein mentioned; and by indenture bearing date on or about the 7th day of April, in the year 1791, the said Richard Lord Sunderlin granted and demised the said mortgaged premises situate in Westmeath and Longford aforesaid, to the said Lord Cloncurry, his executors, administrators, and assigns, for a term of 2000 years, subject to redemption upon payment of the further sum of £8666 13s. 4d., making, together with the said sum of £15,000, the total sum of £23,666 13s. 4d., as by the said indentures may appear; and the said Lord Sunderlin applied the said monies to his own use, as he thought proper

and instead of settling the said estates upon trusts in the will, mortgaged them to Lord Cloncurry,

who, however,
had notice of
the will.

Your suppliant further sheweth, that at the date and execution of the said last mentioned indenture of mortgage, and at the time of the payment of the money advanced on foot thereof, he the said Lord Cloncurry had full and clear notice of the will of the said testator, Anthony Malone, and of the trusts thereof, and that the said lands in said mortgage deed comprised, constituted part of the lands in said will mentioned, and were included amongst the lands bound by the trusts created by the said will, and were therein directed to be settled as hereinbefore mentioned, and that said Lord Sunderlin derived his title under said will.

Your suppliant further sheweth, that the said Lord Cloncurry departed this life, having previously by his last will, bearing date the 26th day of August, 1799, appointed Hugh Lord Carleton, John Lees, junior, deceased, and the Honourable Mary Lawless, afterwards Mary Whaley, widow, his executors.

Your suppliant further sheweth, that the said Hugh Lord Carleton and John Lees, junior, declined to act as such executors, whereupon the Honourable Mary Lawless solicited probate of the said will, and survived her said co-executors, the said Lord Carleton and John Lees, and acted as executrix of the said Lord Cloncurry until her death, which happened in the year 1830; and since her death administration of the goods and chattels of the said Nicholas Lord Cloncurry, unadministered by the said Mary Lawless, has been granted forth of her Majesty's Court of Prerogative in Ireland, to John Conroy Browne, who is now the personal representative of the said Lord Cloncurry, the said mortgagee.

J. C. Browne
is personal re-
presentative of
the mortgagee.

Lord Sunderlin
obtained re-
newals of part
of the trust es-
tate held by
lease with cove-
nant for re-
newal.

But the renew-
als were subject
to the trusts in
the will.

Your suppliant further sheweth, that the said Richard Lord Sunderlin obtained renewals in his own name of the lands of *Lara*, part of &c. held by lease for lives, with covenant for perpetual renewal, and thereby acquired the entire interest therein at law. But your suppliant submits that said renewals and any other renewal obtained of said lands by said Richard Lord Sunderlin, or by any other person or persons, must in this Court be deemed grafts on said original lease, and subject to the trusts in the will of the said Anthony Malone expressed and declared of and concerning the same.

Your suppliant further sheweth, that the said Henry Malone, the eldest son of the said Richard Malone, brother of the said testator, Anthony Malone, and which said Henry Malone was the person next entitled under said will of said Anthony Malone, to the lands,

in case the said Richard Lord Sunderlin, and the said Edmund Malone, his brother, should respectively die without issue male, seeing the said Richard Lord Sunderlin dealing with said estates as his absolute property, and without any regard to the said will of the said testator, Anthony Malone, caused a draft of a bill to be prepared, which was perused and approved of by counsel of eminence, to compel the said Richard Lord Sunderlin to execute such settlement of the said acquired and paternal estates of the said Anthony Malone as by the will of the said Anthony is directed, freed from all conveyances and incumbrances made by the said Lord Sunderlin, and praying such relief as thereby is prayed; as by the draft of said bill, in the possession of some or one of the confederates hereinafter named, when produced, will more fully appear.

Henry Malone, entitled in remainder next after Edmund, caused a bill to be prepared to enforce execution of the trusts of the will.

Your suppliant further sheweth, that the said bill was never filed, in consequence of the said Lord Sunderlin having publicly declared at various times, in the presence of divers persons, that no female should inherit the said lands, but that the said lands should go pursuant to the will of the said Anthony, in case he, the said Lord Sunderlin, and his brother Edmund, should die without issue male.

But Lord S. induced him not to file it.

Your suppliant further sheweth, that the said Henry Malone, who had caused said bill to be prepared, died in the life-time of the said Lord Sunderlin, that is to say in the year 1814, and the said Edmund Malone, the brother of said Lord Sunderlin, having also died without issue as hereinbefore mentioned, in the year 1812, the said Richard Malone, son of the said Henry, thereupon became and was the next male descendant of Richard Malone, the father of the said Anthony Malone, the testator, and was as such entitled to an estate in said lands by virtue of said devise, and the said Richard, the son of said Henry, survived the said Lord Sunderlin.

1812, Edmund Malone died without issue.

1814, Henry Malone died leaving a son, Richard Malone.

Your suppliant further sheweth, that the said Richard Lord Sunderlin died in the month of April, 1816, intestate, without issue, and without having made any such settlement as is by the will of the said testator, Anthony Malone, directed, leaving his two sisters, the said Henrietta and Catharine Malone, his co-heiresses at law, him surviving; and the said Catharine Malone obtained administration of the goods and chattels, rights and credits of the said Lord Sunderlin forth of the proper Ecclesiastical Court, whereby she became his personal representative.

1816, Lord S. died.

His two sisters, co-heiresses.

1816, Richard Malone, son of Henry, filed his bill against the co-heiresses to compel execution of the trust, claiming only a life estate.

Your suppliant further sheweth, that the said Richard Malone, son of the said Henry, shortly after the decease of the said Lord Sunderlin, that is to say on or about the 16th day of December, 1816, filed his bill in this honourable Court against the said Henrietta and Catharine Malone and others, thereby stating the will of the said Anthony Malone, as hereinbefore is stated, and that the said Richard, the plaintiff in the said bill, was alive at the time of the decease of the said testator, Anthony Malone, and was the only son and heir-at-law of the said Henry Malone deceased, and was then the only survivor of the male issue descended from Richard Malone, the father of the said testator, who was living at the time of the death of said testator, and that as such he was entitled to an estate for life in the entire of said acquired and paternal estates of said testator, with remainder to his first and every other son and sons in tail male; and by his said bill the said Richard Malone, after stating and setting forth the several matters and things therein contained, prayed that the said Henrietta and Catharine might be decreed to make such settlement of the said acquired and paternal estates of the said Anthony Malone as by the said will of the said Anthony is directed, freed from all incumbrances created by the said Lord Sunderlin, and by the said Henrietta Malone and Catharine Malone, and prayed such relief as is thereby prayed; as by said bill, remaining as of record in this honourable Court, will more fully and at large appear.

Answer filed;

Your suppliant further sheweth, that the said Henrietta Malone and Catharine Malone, on or about the 16th day of April, 1817, filed their joint answer to the said bill, thereby insisting that the said Lord Sunderlin had entered as heir-at-law of the said Anthony Malone, and not under his will, into possession of all the estates of which said Anthony was seised in fee, and that the said Lord Sunderlin had suffered recoveries, whereby he had acquired the fee of the several lands and premises described by the said Anthony in his said will, as his paternal estates, and that the said Lord Sunderlin was bound by no trust in respect of either the said acquired or paternal estates, and that the said Henrietta and Catharine Malone were co-heiresses-at-law of the said Lord Sunderlin and of the said Right Honourable Anthony Malone, and as such entitled to the entire of the said acquired and paternal estates of the said Anthony,

denying the existence of a trust.

excepting the said lands in the County of Cavan, which they, the said Henrietta and Catharine, claimed under and by virtue of the will of their brother, the said Edmund Malone; as by the said answer, now remaining as of record in this honourable Court, reference being thereunto had, will more fully and at large appear.

Your suppliant further sheweth, that issue was joined in the said ^{1819, cause} cause, and witnesses were examined on both sides, and the same came ^{heard.} on to be heard in this honourable Court on or about the 12th day of July, 1819, and on several subsequent days, and was partly heard, when an arrangement by way of compromise was proposed by and on behalf of said Henrietta and Catharine Malone to the said Richard Malone, to whom it was represented, and on whom it was urgently pressed, that the said ladies were his nearest relations, and then far advanced in life; that they were willing, provided only that a provision were secured to them for their lives, to convey the entire of the said estates to him, the said Richard Malone, in any way he might point out, whereas if the Court were called on to pronounce a decree, the said Richard would thereunder have a mere life interest in the said estates limited to him, without having any power or control over the inheritance.

Your suppliant sheweth that the said Richard Malone, in consequence of these representations, agreed to a compromise, which was accordingly carried into effect by a certain deed bearing date on or about the 1st day of June, 1820, and made between the said Henrietta Malone and Catharine Malone of the first part; Henry Paisley L'Estrange and Alexander Fairbrother Perceval therein named, of the second part; Sir Ralph Gore, Baronet, and Henry William Arabin, Esq., Barrister-at-law, of the third part; and the said Richard Malone of the fourth part; whereby after reciting the several matters therein recited, and amongst others, reciting that the said Richard Malone claimed to be entitled to the several estates of the said Anthony Malone, and had filed his bill against the said Henrietta Malone and Catharine Malone, as therein and hereinbefore mentioned, and that the said Henrietta and Catharine had answered said bill, and that said cause had been partly heard, and that in order to put an end to litigation the said Henrietta and Catharine had come to an arrangement with the said Richard Malone to settle all matters in dispute between them in an amicable manner, and, amongst other things,

Suit compromised by deed,
1st June, 1820

had agreed that the said Henrietta Malone and Catharine Malone should convey the estates therein in that behalf mentioned, being the estates hereinbefore described as both the acquired and paternal estates of Anthony Malone, to the said Richard Malone for life, with remainder to his first and every other son and sons in tail male, with remainder to the said Richard in fee, they, the said Henrietta and Catharine, reserving thereout to themselves an annuity of £3000 a year of the then currency of Ireland, for their joint lives, and for the life of the survivor of them; and also that the said Henrietta and Catharine should convey to the said Richard Malone and his heirs, certain other lands therein mentioned, in the King's County, which were purchased by the said testator, Anthony Malone, after the publishing of his said will, and therefore were not affected by the same, reserving to each of them, the said Henrietta Malone and Catharine Malone, a power to charge the said last-mentioned lands, together with the freehold lands of *Lara*, &c., with a certain sum therein specified, and that the several estates comprised in said deed should remain chargeable with the mortgages and judgments therein mentioned, the said indenture witnessed, that the said Henrietta Malone and Catharine Malone, in consideration of the premises, and in order to carry the said agreement into effect, did grant, bargain, sell, alien, release, and confirm unto the trustees therein named, and to their heirs and assigns, the several lands, hereditaments, and premises in said indenture mentioned, and hereinbefore specified and described as the paternal and acquired estates of the said testator, Anthony Malone, subject to an annuity of £3000 *per annum* thereby provided for the said Henrietta Malone and Catharine Malone, to the use of the said Richard Malone for life, with remainder to his first and every other son in tail male, with remainder to the said Richard Malone, his heirs and assigns, for ever.

Lands conveyed to Richard Malone for life, remainder to first and other sons in tail, remainder to Richard in fee.

Mortgage in fee to Thomas R. Rooper,

Your suppliant further sheweth unto your Lordship, that the said Richard Malone entered into possession or receipt of the rents of the said paternal and acquired estates of the said testator, Anthony Malone, which were so as aforesaid conveyed to him in pursuance of the said compromise, and being so seised and possessed, by indenture bearing date on or about the 14th day of May, 1832, he, the said Richard Malone, granted and conveyed unto Thomas Richard Rooper, one of the confederates hereinafter named, **ALL THAT AND THOSE**

the town and lands of, &c., being the lands hereinbefore described as the paternal estate of the said testator, Anthony Malone, to hold the same unto the said Thomas Richard Rooper, his heirs and assigns, for ever, subject, nevertheless, to the proviso in the said indenture contained for redemption of the said premises, on payment by the said Richard Malone, his heirs, executors, administrators, or assigns, of the sum of £7201 11s. 8½d. sterling, with interest for the same, at the time and in the manner in the said indenture specified ; as by the said indenture may appear.

Your suppliant further sheweth, that the said Thomas Richard Rooper was a connexion and intimate friend of the said Lord Sunderlin and of the said Richard Malone, and was appointed trustee and sole executor of the will of the said Catharine Malone, who died at the time hereinafter in that behalf stated, and your suppliant charges that at the date and execution of the said last-mentioned indenture of mortgage, and of the payment of any money advanced at foot thereof, he, the said Thomas Richard Rooper, had full and clear notice of the will of the said testator, Anthony Malone, and of the trusts thereof, and that the said lands of, &c., comprised in said mortgage, were the lands which in and by the said will were described as the said testator's paternal estates, and were included among the lands bound by the trusts created by said will, and thereby directed to be settled in the manner hereinbefore in that behalf particularly mentioned, and that the said Lord Sunderlin had entered under said will into possession of all the estates thereby described as the acquired and paternal estates of said Anthony, and that the said Richard Malone claimed and derived his own title to said lands under said will of said Anthony, and had obtained possession thereof by means of the compromise carried into effect by the said deed of the 1st day of June, 1820, hereinbefore mentioned, of which deed, and of the compromise therein mentioned, your suppliant charges that the said Thomas Richard Rooper had notice.

Your suppliant further sheweth unto your Lordship, that by indenture bearing date on or about the 10th day of December in the year 1833, and made between the said Richard Malone of the one part, and Henry O'Connor, junior, therein named, of the other part, he, the said Richard Malone, did grant unto the said Henry O'Connor an annuity or yearly rent-charge of £20 sterling, during the life

with notice of the trust.

Annuity to Henry O'Connor,

without consideration, and with notice of trust.

of the said Henry O'Connor, chargeable on the lands of *Castletown*, in the County of Westmeath, being part of the acquired estates of the said testator, Anthony Malone. And your suppliant sheweth, that the said Henry O'Connor paid no valuable consideration for the said annuity, and at the time of the execution of the said deed had full notice of the said will of the said testator, Anthony Malone, and of the trusts thereby created, and that the said Lord Sunderlin had entered into possession of said paternal and acquired estates under the said will of the said Anthony. And your suppliant further sheweth, that the said Henry O'Connor was a near relative of the said Richard Malone, and resided with the said Richard at *Barons-town*, at the date and execution of the said last-mentioned deed, and must have been, and, as your suppliant charges, in fact was perfectly aware of the manner in which the said Richard Malone obtained possession of the said lands of *Castletown*, along with the other lands constituting the acquired estates of the said testator, Anthony Malone, and was fully apprised of the said compromise, and of the said deed so executed in pursuance thereof.

Rooper is personal representative of Henrietta Malone and Catharine Malone.

Your suppliant sheweth, that the said Henrietta Malone and Catharine Malone are both dead, and that all arrears of their said annuities have been paid, and that the said Catharine Malone was the survivor, and died in the year 1831, having previously by her last will appointed the said Thomas Richard Rooper executor of her said will, who duly proved the same, and is now the personal representative of the said Catharine Malone and of the said Henrietta Malone.

Will of Richard Malone, devising to trustees,

Your suppliant sheweth, that the said Richard Malone being so seised under and by virtue of the said indenture of the 1st day of June, 1820, for the term of his life, of the said acquired and paternal estates of the said Right Honourable Anthony Malone, situate in the Counties of Westmeath, Longford, Roscommon, Cavan, and the City of Dublin; and being also seised in fee or some other sufficient estate of certain other lands situate in the King's County and elsewhere, did by his last will and testament in writing, bearing date on or about the 16th day of April, 1830, duly executed and attested for devising freehold estates, give and bequeath all his estate, real and personal, to Henry O'Connor and Alicia O'Connor his wife, Hugh Morgan Tuite, and Thomas Ardill, therein named, and to their

heirs, executors, administrators, and assigns, upon the trusts in the said will mentioned, that is to say, as to the said estates whereof he the said Richard was seised in the Counties of Westmeath, Longford, Roscommon, Cavan, and the City of Dublin, which were the estates of his great grandfather, Richard Malone of *Rathduff*; and afterwards of *Baronstown*, and of his said grand-uncle, the said Right Honourable Anthony Malone, being the estates hereinbefore mentioned, upon trust for the payment of all his, the said testator Richard Malone's own and his father's debts, and of the legacies and annuities in the said will mentioned, and of the costs attending the execution of his said will, in case his personal estate should prove insufficient for these purposes, in exoneration of his King's County estates, which he the said Richard Malone, by his said will, charged with the said debts, legacies, and annuities and costs, for the purpose of more satisfactorily securing the payment thereof, and which King's County estates, together with the personal estate of the said Richard Malone, your suppliant charges are abundantly sufficient for the discharge of the said debts, legacies, annuities, and costs ; and subject to the said debts, legacies, annuities, and costs, and particularly subject to an annuity of £500 *per annum* for the separate use of his sister, Catharine Whitestone, for life, in trust for his said sister the said Alicia O'Connor, and her husband the said Henry O'Connor, and the survivor of them, for life, with remainder to the use of Edmund Malone, first son of the late Edmund Malone, of *Ballynahown*, Esquire, for life, with remainder to his first and every other son in tail male, with remainder to John Malone, second son of the said Edmund Malone of *Ballynahown*, for life, with remainder to his first and every other son in tail male, with remainder to Edmund L'Estrange therein named, for life, with remainder to his first and every other son in tail male, with remainder to George L'Estrange therein named, for life, with remainder to George Henry L'Estrange, son of the said George, for life, with remainder to his first and every other son in tail male, with reversion to the right heirs of the said Richard Malone the testator ; and the said testator afterwards duly executed a codicil to his said will, duly attested for the devising of real estates, and thereby nominated Edward Meadows Dunne, therein named, a joint executor of his said will, in addition to those whom he therein stated he had pre-

subject to
£500 *per annum* for separate use of Catharine Whitestone, for Alicia O'Connor and her husband (since deceased), for life,
remainder to John Malone, of *Ballynahown*,
remainder to Edmund L'Estrange,
remainder to George Henry L'Estrange,
remainder to his first and other sons,
reversion to heirs of Rich. Malone.
E. M. Dunne executor.

Legacies charged on his estate for Henry and St. George Stepney.

viously appointed to that office, and thereby bequeathed to said Edward M. Dunne the sum of £1000, and to Henry Stepney and St. George Stepney, therein named, the sum of £1500, and charged the said several sums upon the estates of the said Anthony Malone; and by his said will and codicil the said testator bequeathed certain small annuities to John Sherwood and Arthur Doherty therein named, for their respective lives, but the said John Sherwood and Arthur Doherty are dead, and no sum whatever is payable in respect of the said annuities or either of them, as in and by the said will and the said codicil thereto, in the possession of the said Alicia O'Connor, or her confederates hereinafter named, will appear.

Death of Richard Malone, leaving his two sisters his co-heiresses.

Your suppliant further sheweth, that the said Richard Malone departed this life on or about the 6th day of January, 1834, without issue, leaving his sisters, the said Alicia O'Connor and Catharine Whitestone, his co-heiresses-at-law, who are also co-heiresses-at-law of the Right Honourable Anthony Malone, and of the said Lord Sunderlin, and of the said Henrietta Malone and Catharine Malone.

Probate to E. M. Dunne.

Your suppliant further sheweth that Edward Meadows Dunne, the executor named in the said codicil of the said Richard Malone, has proved the said will and codicil, and obtained probate thereof forth of the proper Ecclesiastical Court, and has possessed himself of the personal estate and effects of the said testator, Richard Malone, and that upon the death of the said Richard Malone the said Alicia O'Connor and Henry O'Connor entered into possession of the said acquired estates and paternal estates of the said Anthony Malone, so as aforesaid situate in the counties of Westmeath, Longford, Cavan, Roscommon, and the city of Dublin, or into receipt of the rents and profits thereof.

The trustees in his will in possession.

And your suppliant sheweth, that the said Henry O'Connor, the elder, departed this life on or about the 25th day of January, 1834, leaving the said Alicia, his wife, him surviving.

Plaintiff's pedigree.

And your suppliant further sheweth, that your suppliant is the eldest son and heir male of said Richard Malone hereinbefore mentioned, who was the second son of said Richard Malone, the brother of said testator, Anthony Malone, and that your suppliant's said father, Richard Malone, who was living at the death of said Anthony Malone, died on or about the 18th day of June, 1806, and your suppliant sheweth that your suppliant

Plaintiff's father was living at death of the testator, Anthony Malone, but plaintiff was not so.

was not living at the time of the death of said testator, Anthony Malone, and that on the death of said Richard Malone, the son of Henry Malone, and the person last seised of said estates, without issue male, your suppliant became entitled, under and by virtue of said will, to an estate in tail male, with such remainders over as this Court shall please to direct, in all said lands and premises, as well the paternal as the acquired estates in said will of said Anthony Malone mentioned ; and your suppliant submits that he ought not to be prejudiced, nor ought his rights to be in any wise affected by the compromise so entered into by the said Lord Sunderlin with his brother, the said Edmund Malone, respecting the said part of the said trust estates so situate in the County of Cavan, or by the said conveyance entered into and carried into execution by the said Richard Malone, lately deceased, with the said Henrietta Malone and Catharine Malone respectively, as to all the said trust estates, such last-mentioned compromise having been entered into in a suit to which your suppliant was not a party, and of which your suppliant, until a recent period, was wholly ignorant.

On death of Richard, plaintiff entitled to estate tail in possession.

Your suppliant further sheweth, that on or about the 9th day of July, 1836, your suppliant caused a notice to be served on the said Alicia O'Connor, Thomas Ardill, Hugh Morgan Tuite, Michael Whitestone, and Catharine his wife, thereby apprising them of the nature of your suppliant's claim to the said trust estates, and calling upon them to make such a settlement as by the said will of the said Anthony Malone is directed ; as by the said notice, to which your suppliant refers, may appear ; but that the said persons on whom said notice was so served have not, nor has any of them, complied with the requisition of said notice, and in answer, or by way of answer thereto, a notice was served on behalf of said Alicia O'Connor, Hugh Morgan Tuite, Thomas Ardill, and of Michael Whitestone and said Catharine Whitestone, his wife, signed by John Smith, their Solicitor, which notice was merely illusory, whereby said John Smith merely required your suppliant to shew proof of your suppliant's title, and stated that he would attend at any time and place appointed by your suppliant to investigate such proof, but said notice contained no offer or engagement whatever, on the part of any of the said parties, upon which your suppliant could act.

Notice from plaintiff to trustees.

Your suppliant shews that it is apparent on the face of the said

will of the said Richard Malone, the person last seised of said estates, that at the time of making his said will, he, the said Richard, was fully aware that his right to devise the said trust estates was liable to be impeached, for he, the said Richard, after directing his debts, legacies, and the costs attending the execution of his said will, to be paid out of the rents and profits of the said trust estates, proceeds in his said will to direct, in order, as he thereby states, more satisfactorily to secure the payment of his said debts, legacies, and costs, that the same shall be charged on his, the said Richard's, estates in the King's County, which latter estates were not affected by the trusts contained in the will of the said testator, Anthony Malone; but the said Richard must have known that the said trust estates were abundantly sufficient in value to secure, in the most ample and satisfactory manner, the payment and discharge of the said debts, legacies, and costs, provided the said Richard was entitled to charge the same thereon.

Co-heiresses of Richard Malone represent first estate of inheritance under his will.

Your suppliant further sheweth, that none of the said persons to whom the said Richard Malone purported to devise the said estates for life, with remainder to their first and other sons in tail male, has now any male issue, and that the said Edmund Malone, one of the said devisees for life, has lately died without issue, and that the said sisters and co-heiresses of the said Richard would now be entitled to the first vested estate of inheritance in the said estates, supposing the said disposition thereof, so affected to be made by the said Richard Malone as aforesaid, to be valid.

Your suppliant charges, that the said confederate, Thomas Richard Rooper, resides out of the jurisdiction of this honourable Court.

Your suppliant further sheweth, that your suppliant has applied in a friendly manner to the said Alicia O'Connor, Michael Whitestone, and Catharine Whitestone, his wife, and their confederates hereinafter named, to make and execute a settlement of the said trust estates, as directed by the said will of the said Anthony Malone, so as to limit an estate tail therein to your suppliant, and in particular your suppliant, on or about the 9th day of July, 1836, caused a notice to be served upon the said Alicia O'Connor, Thomas Ardill, Hugh Morgan Tuite, Michael Whitestone, and Catharine his wife, adverting to the said will, and requiring them to convey to

your suppliant such estate as he was entitled to under said devise, in said lands and premises, and offering to have all necessary deeds and documents prepared, and to pay all expenses properly attendant on said conveyance, and further offering to give satisfactory proof that your suppliant was the eldest son and heir of said Richard Malone as aforesaid, and requiring them to give a direct answer to said notice within a reasonable time ; and your suppliant hoped his requests would have been complied with.

But now so it is, may it please your Lordship, that the said Alicia O'Connor and Michael Whitestone and Catharine his wife, combining and confederating with the said Hugh Morgan Tuite, Thomas Ardill, John Malone, of *Ballynahown*, Edmund L'Estrange, George L'Estrange, George Henry L'Estrange, Edward Meadows Dunne, Henry Stepney, and St. George Stepney, who respectively claim an interest in the said trust estates under the said will of the said Richard Malone, lately deceased, as hereinbefore mentioned, and with the said Henry O'Connor, the younger, Thomas Richard Rooper, John Conroy Browne, the administrator and personal representative of the late Nicholas Lord Cloncurry, and with divers other persons at present unknown to your suppliant, whose names, when discovered, your suppliant prays he may be at liberty to insert herein, with apt words to charge them as parties defendants hereto, and contriving how to wrong and injure your suppliant in the premises, they, the said Alicia O'Connor, Catharine Whitestone, and their confederates, absolutely refuse to comply with such requests ; and they at times pretend that the said Richard Malone, lately deceased, was not only the person last seised of said premises, but was entitled to the reversion thereof, by virtue of the said deed of the 1st day of June, 1820, and that he was bound by no trust in respect of the said reversion, and that they, the said Alicia O'Connor and Catharine Whitestone, are his co-heiresses-at-law, and, as such, are now entitled to the seisin and possession of the said estates, whereas your suppliant charges the contrary thereof to be the fact, and that by the provisions of the said deed, the said Richard was seised for the term of his natural life only, and that as to the reversion which should have been limited over by the said deed, in conformity with the directions of the will of the said Right Honourable Anthony Malone, he, the said Richard, was a mere trustee for the purpose of

Combination.

Pretences.

1 That Richard last seised, was entitled under deed of compromise to reversion absolutely, and that co-heiresses are now entitled. Charge contrary.

making such settlement as by said will is directed, and that the said Alicia O'Connor and Catharine Whitestone, who are now seised of the legal estate of the said lands and premises either as co-heiresses or devisees of the said Richard, are liable to the said trusts, and bound to perform the same.

2nd pretence,
that Richard
had power, un-
der deed of
compromise, to
devise, and did
devise to his
sister for life.
Charge con-
trary.

And at other times they, the said Alicia O'Connor and Catharine Whitestone, will admit that the said Richard was seised for his own life alone, but then they insist that by the limitation of the reversion of the said trust estates in the said deed of the 1st day of June, 1820, he had a power of disposing of the fee and inheritance of the said trust estates, and that he did dispose thereof by his will, whereby he has devised a life estate in said lands and premises to the said Alicia, subject to an annuity for the said Catharine, and subject to the several other charges in the said will contained; whereas your suppliant charges that the said Richard Malone had no right or title whatsoever to devise said lands to his said sisters, or to either of them, inasmuch as the said will of the said Anthony Malone, under which will the said Richard derived his own title to said trust estates, expressly directs that the said testator's said acquired paternal estates should be settled and limited in the male line of his family, and in his name and blood, so far as the rules of Law would permit.

Co-heiresses
threaten to cut
timber, and
have cut part.

And your suppliant charges that there is a quantity of valuable trees standing and growing on the said lands and premises described in the will of the said Anthony Malone as his acquired and paternal estates, and the said Alicia O'Connor and Catharine Whitestone and their confederates threaten that they will cut down and fell the same, or a considerable part thereof; and the said Alicia O'Connor has already cut down a part of said timber.

3rd pretence,
that defendants
are entitled to
accruing rents.

And they, the said Alicia O'Connor and Catharine Whitestone, and their confederates, give out and allege that they or some of them are entitled to the accruing rents of the said trust estates, and that they will proceed at law against the tenants of the said trust estates, for the purpose of enforcing the payment of the said rents, as the same shall from time to time become due, and have actually commenced such proceedings.

4th pretence,
plaintiff is ille-
gitimate.

And at other times said confederates allege and pretend, that the said Richard Malone, your suppliant's father, died without lawful issue, and that your suppliant is not, as his son and heir, entitled to

the said estates, or to any benefit under the said will of the said Right Honourable Anthony Malone, your suppliant not being, as they allege, legitimate, in consequence of some informality which, as they allege, existed in the marriage of your suppliant's father and mother, the contrary of which allegations your suppliant charges to be the truth, your suppliant's parents having been duly and legally married before the birth of your suppliant.

Charge the contrary.

And said confederates at other times allege, that although a marriage was solemnized between your suppliant's parents, in the month of January, 1801, which was before the birth of your suppliant, yet such marriage was not valid, inasmuch as the same was celebrated, as said confederates allege, by a Roman Catholic clergyman, and that said Richard Malone, your suppliant's father, was at that time a Protestant, in consequence of which, as they pretend, said marriage was void; but your suppliant charges, that although the said Richard Malone was educated and brought up as a member of the Established Church, yet several years before his said marriage with your suppliant's mother, who was always a Roman Catholic, he became, and was at the time of said marriage, and continued to be and profess himself a Roman Catholic, and that he afterwards lived in the profession of the Roman Catholic faith, and died therein; and as evidence thereof, your suppliant charges that he constantly and regularly attended Divine Worship at various Roman Catholic chapels in England and Ireland, and adopted the tenets of the Roman Catholic religion, and conformed to the rites thereof, and that he continued so to do up to the time of his death.

5th pretence: plaintiff's father, a Protestant, was married by a Roman Catholic clergyman.

Charge: he became a Roman Catholic.

And your suppliant further charges, that the said marriage was duly and legally had and solemnized between your suppliant's said father and mother, then both professing the Roman Catholic religion, and that they lived and were received and visited as husband and wife thenceforth, as well in different parts of England as in Ireland, and by various highly respectable persons, including, amongst others, the said sisters of the said Richard Lord Sunderlin, the sisters of your suppliant's said father, and other members of the Malone family.

Your suppliant further sheweth, that the said marriage was solemnized on or about the month of January, 1801, in the chapel of Townsend-street, in the City of Dublin.

General aver-
ment.

Prayer.

That trusts of
will of Anthony
Malone may be
carried into
effect.

That plaintiff's
degree of rela-
tionship to tes-
tator may be
ascertained.

That plaintiff
may examine
old witnesses
de bene esse.

That the male
branches of tes-
tator's family
living at his
death be
ascertained.

That a settle-
ment of the es-
tates, pursuant
to said will of
Anthony Ma-
lone, may be
decreed free
from incum-
brances,
with a limita-
tion to plaintiff
in tail male in
possession.

Injunction to
give possession.

and to restrain
waste,

and from
receipt of rents.

All which actings, doings, &c., *ante*, p. 18.

[*Interrogate fully, and proceed thus*]:—

And that the trusts of the said will of the said Right Honourable Anthony Malone may be declared and carried into execution under the direction of this honourable Court.

And that your suppliant's kindred and degree of relationship to the said testator, the said Right Honourable Anthony Malone, may be ascertained and declared; and that, if necessary, your suppliant may be at liberty to examine old witnesses *de bene esse* for the purpose of preserving their testimony in relation thereto, as well with respect to your suppliant's legitimacy, if disputed, as in all other respects.

And that it may be ascertained in such manner as your Lordship shall think fit, who were the several members of the male branches of the said Right Honourable Anthony Malone's family, living at the time of his death, and what members thereof have been since born.

And that the said Alicia O'Connor and such of the confederates as are able and bound so to do, may be decreed to make such settlement of the said acquired and paternal estates of the said Anthony Malone as by the said will of Anthony is directed, and by such conveyance or conveyances, and with such limitation as your Lordship shall think fit, and in particular, that your suppliant may be decreed entitled to an estate in tail therein, in possession, freed from all incumbrances and conveyances created by the said Lord Sunderlin, by the said Henrietta Malone and Catharine Malone, by the said Richard Malone lately deceased, or by the said defendants or any of them.

And that the injunction of this honourable Court may issue to put your suppliant in possession of the same accordingly.

And that the estates may be exonerated from all mortgages, judgments, and other incumbrances created by the acts of the said Lord Sunderlin and Richard Malone respectively, or of either of them.

And that the said Alicia O'Connor and her confederates may be restrained from committing waste, and from interfering and meddling with the said estates; and that the said defendants may be restrained and prevented from receiving any part of the rents thereof which accrued due since the death of the said Richard Malone, lately deceased.

And that the said defendants may be restrained by the injunction of this honourable Court from proceeding at Law for the recovery of the said several estates, or of any part thereof, and of the rents thereof, until the hearing of this cause.

And that a Receiver may be appointed to receive the rents, issues, and profits of the said estates pending this cause. Receiver.

And that the said lands and premises in the pleadings mentioned, now out of lease, or that shall at any time pending this cause be out of lease, may, from time to time, be set by the order of this honourable Court.

And that the defendants may bring in and deposit in Court, to the credit of this cause, the title-deeds, leases, muniments, writings, and papers relating to said several estates hereinbefore mentioned, as well the acquired as the paternal estates of the said Anthony Malone, and also a true and accurate rent-roll of the several lands and premises, and of the leases and agreements under which the same have been demised, and their respective dates, terms, and descriptions of the premises in them respectively contained, and the number of acres in each set forth, and by whom and to whom made, and where respectively situate, in what parish, barony, and county; and that all necessary accounts may be taken. Deposit title deeds.

And that the said defendants, before they answer your suppliant's bill, may view and endorse in the hands of your suppliant's Solicitor or commissioner, according to their several modes of answering, all such exhibits as shall be produced to them respectively, and that your suppliant may have such other relief in the premises as to your Lordship shall seem meet, and the circumstances of the case may require. May it please, &c. View and endorse exhibits.

Pray subpoena to appear and answer against Alicia O'Connor, Hugh Morgan Tuite, Thomas Ardill, Michael Whitestone, Catharine Whitestone, Edward M. Dunne, John Malone, Edward L'Estrange, George L'Estrange, Henry O'Connor, Henry Stepney, St. George Stepney, John Conroy Browne, Thomas Richard Rooper, when he comes within jurisdiction.

See 2 Dru. & Wal. 491; 6 Clarke & F. 572; 8 ib. 179.

BILLS RELATING TO TRUST DEEDS AND DEEDS OF COMPOSITION WITH CREDITORS.

PRELIMINARY DISSERTATION.

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The object of composition deeds, like insolvency or bankruptcy, to release the debtor, and divide his property among his creditors. Three classes of these deeds, viz. :
1. Letter of licence,

Trust deeds and composition deeds have been censured as being calculated to subvert the design of the bankrupt and insolvent laws, the objects of which laws are an impartial distribution of the debtor's property amongst his creditors, and a release of the trader from his engagements: *Vere ex parte*, 19 Ves. n. (a) at p. 101; but experience has proved that where mutual confidence exists between the parties, these objects can be attained by means of trust deeds or composition deeds, with far less of personal annoyance to the debtor, and of expense to the estate.

Composition deeds have been divided into three classes, viz. :

1. Those in which the debtor covenants to pay the debts, or a dividend upon the debts, by instalments, and the creditors covenant to accept the

instalments in discharge of their debts, and not to molest or sue the debtor, unless he should fail to pay the instalments, and also covenant to release the debtor when the instalments shall have been all paid.

A third person sometimes joins to guarantee payment of the instalments.

This class of composition deeds gives time to the debtor, and (if a dividend be accepted) reduces the amount of his debts, without either depriving him of his property, or controlling him in the management of it.

2. Deeds of inspectorship with letters of license, whereby the creditors grant unto the debtor liberty for a limited time, to manage or wind up his affairs, under the control of the inspectors, and covenant not to sue or molest him during that time, and to release him, when all his estate and effects are distributed; and the debtor on his part covenants to observe the inspector's instructions, and to pay over the money to be received, to the inspector, to be distributed among the creditors rateably, according to the amount of their debts.

This class does not at once deprive the debtor of his property, but assumes that the best mode of making it available for the creditors, is to permit the debtor, under proper control, to wind up his own affairs, convert his property, and apply it to payment of the debts.

3. A conveyance of all the debtor's property in trust for his creditors. (See *Taylor v. Gorman*, 6 Ir. Eq. R. 321).

By this class of composition deeds, the property of the debtor is at once vested in the trustee, to be by him realized, and distributed among the creditors, who on their part covenant not to sue the debtor; and thus the two above-mentioned objects, viz., the distribution of the debtor's property, and the release of the debtor, are attained. But in reference to this class of composition deeds, it is to be observed, that the execution of a general conveyance or assignment of all his property by a trader, is in itself an act of bankruptcy, unless the case be brought within the provisions of the Irish Bankrupt Act, 6 Will. IV. c. 14, s. 20, which (corresponding to the 6 Geo. IV. c. 16, s. 4, Eng.), provides, that when any such trader shall, after the Act shall have come into effect, execute any conveyance or assignment by deed, to a trustee or trustees, of *all* his estate and effects, for the benefit of *all* the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy unless a commission issue against such trader, within six calendar months from the execution thereof by such trader; provided that such deeds shall be executed by every such trustee, within fifteen days after the execution thereof by the said trader, and that the execution by such trader and by every such trustee, be attested by an Attorney or Solicitor, and that notice be given within two months after the execution thereof by such trader, in case such trader resides in Dublin or within forty miles thereof, in the *Dublin Gazette*, and also in two Dublin daily newspapers, and in case such trader does not reside within forty miles of Dublin, then in the *Dublin Gazette*, and also in one Dublin daily newspaper, and one provincial newspaper, published near such trader's residence; and such notice shall contain the date and execution of such deed, and the name and

in consideration of the debtor, or a third party undertaking to pay by instalments.

2. Deeds of inspectorship.

3. Trust deeds.

Conveyance of debtor's property to trustee, for creditors,

is an act of bankruptcy,

unless it be a conveyance of all the debtor's property, for all his creditors, executed six months, at least, previously to any commission of bankruptcy; executed by the debtor and the trustee, attested, &c. published as required by the Stat. 6 Geo. 4, c. 16, s. 4.

place of abode respectively of every such trustee, and of such Attorney or Solicitor."

Effect of 6
Will. IV. c. 14,
s. 20.

The effect of the foregoing section is, to protect such a conveyance after six months, provided advantage be not taken of it within that period, and provided that it include the entire of the bankrupt's property, and be made for the benefit of all his creditors, and provided that the conveyance be executed, attested, and published as required by the Act.

The trustee cannot, it is plain, make title to the bankrupt's property, until after the expiration of six months from the execution of the deed by the trader.

Suits are frequently instituted in Courts of Equity for the purpose of carrying into effect composition agreements and conveyances to trustees for payment of creditors. The objects of such suits are various. Sometimes it is sought to compel a particular creditor to accept a dividend made under a composition to which he has assented. At other times the bill is filed by a particular creditor, on behalf of himself and the other creditors, seeking to obtain the benefit of the trusts of the composition deed; *Field v. Lord Donoughmore*, 2 Dru. & Wal. 630; or by some creditors on behalf of all, seeking to have the funds administered according to the trusts of the deed, &c. *Spottiswoode v. Stockdale*, Coop. C. C. 102.

In administering this branch of their jurisdiction, Courts of Equity are governed by certain general principles, which the Draftsman should bear in mind while preparing such bill; and these we propose therefore briefly to consider.

A creditor
cannot enforce
the provisions
of a trust deed
unless he is
himself an ex-
ecuting party or
has bound
himself,

It has been fully established by a train of decisions, that when by deed a trust is created for payment of debts, creditors who are not parties thereto, do not thereby become *cestui que trusts*, or invested with any power of insisting adversely on the execution of the trusts; *La Touche v. Earl of Lucan*, 2 Dru. & Wal. 432, S. C. 7 Clarke & F. 772; *Garrard v. Lord Lauderdale*, 3 Sim. 1; 2 Russ. & Myl. 451; *Walwyn v. Coutts*, 3 Sim. 14; S. C., 3 Mer. 707; *Gibbs v. Glamis*, 11 Sim. 584; *Evans v. Bagwell*, 2 Con. & Law. 612; the principle being, that such deeds are mere private arrangements made by the debtor for his own convenience, and the trustees are trustees for him, and not for the creditors. If, indeed, the creditor have acquiesced in the deed, or acted under its provisions, and complied with its terms without any expression of dissatisfaction on the other side, he may thereby subject himself to the provisions of the deed, and become entitled to the benefit of it, although he may not actually have signed it; *Field v. Lord Donoughmore*, 1 Dru. & War. 227; *Spottiswoode v. Stockdale sup.* (Coop. C. C. 102). But it seems that the mere communication to him of the creation of the trust, would not be sufficient to alter the character of the dealing, or defeat the power of revocation which remains in the debtor after the execution of the deed; *Garrard v. Lord Lauderdale, sup.* unless perhaps such communication induced the creditors to forbear from pressing their demands. See *Acton v. Woodgate*, 2 Myl. & K. 492; *Forsythe on Compositions*, 72.

by acting under
it, &c.

There are several modes by which a composition deed may be avoided : Compositions avoided ;
 of these the first and most obvious is a prior act of bankruptcy, the effect of which, if proceeded on in due time, is to render the composition nugatory, 1. By prior act of bankruptcy.
Doe d. Pitcher v. Anderson, 5 M. & Selw. 161 ; and the circumstance of a dividend having been received by the creditors under the deed, in ignorance of the act of bankruptcy, will not prevent them from proving under the commission, *ib.*

2ndly. A composition deed may become nugatory for want of consideration. 2. By want of consideration.

We have before (p. 51) adverted to the Stat. 10 Car. I. S. 2, c. 3, Ir. against fraudulent conveyances—the effect of which Statute is to avoid all *voluntary* conveyances of *lands*, as against a purchaser (see *Moffett v. Whittaker*, Longf. & T. 141 ; *Lessee Donohue v. Firman*, 1 Jones, 508) ; although the purchaser had notice and there may have been a meritorious consideration, *Doe d. Otley v. Manning*, 9 East, 59 ; but such voluntary deed, if executed by a conveyance, and not resting in mere contract, will be enforced against the executor and his representatives, *Pulvertoft v. Pulvertoft*, 18 Ves. 84 ; *Ellison v. Ellison*, 6 Ves. 656 ; *Bill v. Cureton*, 2 Myl. & K. 503 ; *Jefferys v. Jefferys*, Cr. & Ph. 138 ; *M'Fadden v. Jenkyns*, Ph. 153 : a mere conveyance by a debtor to a trustee for his creditors, from which no benefit results to the debtor, however honest in intention, is fraudulent and void under the Statute. A trust deed giving no release, &c. to the debtor is voluntary as against him.

It frequently happens in composition deeds that a consideration arises from the nature of the instrument itself. So, in like manner, the execution by some of the creditors gives the debtor the protection of the deed against their demands, which amounts to a consideration sufficient to support the deed, *Boothbey v. Sowden*, 3 Campb. 175 ; and on the other hand, the assignment of his property by the debtor, is a sufficient consideration for the creditor joining in the deed, as would also be the junction of a surety in the deed, *Steinman v. Magnus*, 11 East, 390. What consideration supports a deed ?

A person who has any interest, joining in the deed for the purpose of binding that interest, or of parting with it, as, for instance, a jointress or remainder-man, executing the deed, or any other whose concurrence is thought necessary, will sustain it ; 3 Sugd. Vend. 296 (10th ed.), for the mutual accommodation is deemed a valuable consideration. Release of a voluntary bond (*Ex parte Berry*, 19 Ves. 218), or releasing the arrears of a voluntary annuity (*Nixon v. Hamilton*, 2 Dru. & Wal. 364 ; S. C. 1 Ir. Eq. R. p. 49), are valuable considerations sufficient to validate a conveyance. Indeed the Court is anxious to support a fair deed, and is never disposed to weigh the consideration in nice scales.

Where there is a total absence of consideration, a fraudulent intent is presumed ; but any valuable inducement, even the *bonâ fide* expectation of a consideration, though perhaps never afterwards realized, would rebut the presumption of fraud, and thus in effect impart value to the deed. See *Roberts on Fraud*. Conv. 258.

On the other hand, when the question is, if there be a purchaser entitled to avail himself of the Statute, the rule seems to be, that the same conside-

Requisites of a purchaser to set aside a voluntary deed.

A trust deed for creditors, though voluntary, is preferred to any other voluntary deed, though prior.

Voluntary deed validated by matter *ex post facto*.

3. Non-compliance with conditions.

Effect of vacating clauses in Law,

and in Equity.

4. By misrepresentation.

rations which would have supported the first deed, will entitle a claimant under a subsequent deed to set it aside. 3 Sugd. Vend. 218 (10th ed.) But such claimant must be a fair *bonâ fide* purchaser, without imputation of fraud; Lessee Bonny *v.* Griffith, Hayes, 115. He must also either have the legal estate so as to want no aid from Equity, or else be a purchaser without notice; Rob. Fraud. Conv. 507; and lastly, he must rely on the Statute, and not take any collateral security against the prior voluntary deed, for by so doing he disavows the aid of the Statute, and proves that he has not been deceived by the voluntary deed; Rob. Fraud. Conv. 167.

Where there are two voluntary deeds, if the last executed be a conveyance in trust to pay debts, it shall take precedence; 1 Fonb. Eq. 270, n. (a) 5th ed.

It only remains to observe, that a deed voluntary in its inception, may be validated by matter *ex post facto*, as, for instance, where the voluntary deed has become the inducement to a marriage; or where the grantee in the voluntary deed has assigned to a purchaser for value; and such a purchaser would be preferred to a subsequent purchaser from the grantor in the voluntary deed.

3. A conditional composition may be avoided by non-performance of the condition.

Composition deeds frequently contain a clause vacating the instrument unless it be executed by all the creditors within a certain time. At law (a), such clauses must, in general, be strictly complied with. Hence, if the deed require all the creditors to join, the debtor setting up the deed is bound to prove that all did join; Catherwood *v.* Chabaud, 1 B. & Cr. 150. But in Equity a creditor may bind himself by having acted under such deed, although he have not executed; Spottiswoode *v.* Stockdale, *sup.* (Coop. C. C. 102); Field *v.* Donoughmore, *sup.* (2 Dru. & War. 227). Even in Equity, if a creditor agrees, without consideration, to receive a composition for his debt if paid on a day certain, non-payment on that day will remit the creditor to his original rights, on the principle, *cujus est dare, ejus est disponere*; Sewell *v.* Musson, 1 Vern. 210; and in a case where the deed appeared to have been intended for the benefit of all or none, a bill to enforce the deed, where some of the creditors had refused to accede to it, was dismissed; Atherton *v.* Worth, 1 Dick. 375. However, at the instance of the debtor, when he has conveyed his property to a trustee for his creditors, a Court of Equity may perhaps interfere, on the principle of relieving against penalties and forfeitures; Leicester *v.* Rose, Ambl. 331.

4. A composition may be avoided by misrepresentation of the debtor; as, for example, where the debtor induced a creditor to concur in the deed by representing to him untruly that all his other creditors had joined; Cooling

(a) Even Courts of Law will have regard to the spirit of the instrument when a strict adherence to the letter would plainly violate the intention; Small *v.* Marwood, 9 B. & Cr. 300; Wells *v.* Greenhill, 5 B. & Ald. 869.

v. Noyes, 6 T. R. 263. This misrepresentation vitiates the deed, for it is directly at variance with the two-fold objects of the composition, namely, the release of the debtor, and the equal distribution of his property.

Again, it is presumed that each creditor compounds for his entire demand, and contracts with all the other creditors, as well as with the debtor, that the latter shall, on execution of the deed, be discharged from all his debts; hence the rule so well established, both at Law and in Equity, that private underhand agreements with particular creditors for any extra advantages, are void; *Jackman v. Mitchell*, 13 Ves. 581; *Hely v. Hicks*, 3 Ir. L. R. 92; *Pendlebury v. Walker*, 4 Y. & Col. (Ex.) 424, and cases there cited.

Underhand agreements with particular creditors void.

Every demand of a creditor joining in the deed is extinguished, save as appears on the face of the deed, which regulates the extent of his demands against the debtor or his property. If a party have several demands against the debtor, and after claiming some of his demands under the composition deed, he seek to recover the remainder from the debtor, or out of his property, this defeats both the objects of the composition deed; it is a fraud on the other creditors, by depriving them of part of the fund they had reckoned on, and it is an act of oppression as regards the debtor, who has given up all his property for the benefit of his creditors; *Holmer v. Viner*, 1 Esp. R. 133. If the other creditors had been aware that a part of the debtor's property was to remain liable to the payment of this reserved claim, and that the debtor would not be made a free man by the deed, they might have declined to accede to the composition; and so far has this doctrine been carried, that in one case it was held, even where the creditor omitted to put the amount of his debt opposite his name, so that the deed as to him was executed in blank, yet it bound him to abide by the terms of the composition deed for his then existing debt, whatever it might be; *Harrhy v. Wall*, 1 B. & Ald. 103.

But if the further security were retained, or the further claim reserved with the knowledge and concurrence of the other creditors, the case would be different; as, for instance, where a stipulation to that effect was recited in the composition deed; *Lee v. Lockhart*, 3 Myl. & Cr. 302; *Duffy v. Orr*, 1 Clarke & F. 253; *Cullingworth v. Lloyd*, 2 Beav. 385. And there is no principle which precludes a compounding creditor from retaining a collateral security against a third person; *Thomas v. Courtney*, 1 B. & Ald. 1; nor is there any principle to prevent the debtor from entering into a subsequent binding engagement with one of his creditors, just as a bond given by a bankrupt, after he had obtained his certificate, would be binding on him; *Tooke v. Tucke*, 12 Moore, 435; 9 B. & Cr. 437.

But one compounding creditor may reserve a part of his demand, with the consent of the other creditors, or may avail himself of a collateral security, or of a subsequent promise by the debtor, unconnected with any secret bargain prior to the composition.

But if there be a secret agreement between the debtor and one of his creditors at the time of entering into the composition, the contract being in its inception fraudulent and void, cannot, it seems, be revived by a subsequent promise; *Cockshott v. Bennett*, 2 T. R. 763; *Jackman v. Mitchell*, *sup.* (13 Ves. 581.) *Sed vide* *Eastbrook v. Scott*, 3 Ves. 456.

As to the right of the creditors to interest, it may be useful to observe, that the mere direction by deed to pay a debt does not infer either a con-

Interest on debts.

tract or trust to pay interest upon debts by simple contract, *Hamilton v. Houghton*, 2 Bligh, p. 186.

Parties.

Bills for execution of the trusts of composition deeds may be filed either by the trustees therein, or by one of the creditors, on behalf of himself and the others who have a common interest in the execution of the trusts, *Batten v. Parfitt*, 2 Y. & Col. C. C. 343; but any creditors who claim an interest adverse to that of the creditors generally, ought to be defendants; as also any creditors who are in possession of the trust estate; the trustees of the deed must, of course, be parties, and the debtor himself, unless it be very clearly shewn, by pleading and proof, that there will be no surplus; *Bedford v. Gates*, 4 Y. & Col. (Ex.) 21; see also *Holland v. Baker*, 3 Hare, 68.

Whatever doubts may have existed as to the necessity of making parties the creditors who are named in a schedule to a trust deed, prior to the late Rules (see *Harvey v. Lawlor*, 3 Dru. & War. 168; *Prosser v. Edmonds*, 1 Y. & Col. (Ex.) 481; *Hamilton v. Houghton*, *supra*), it seems now plain, that if the fund be real estate vested in a trustee authorized to sell, the creditors who are *cestui que trusts* are sufficiently represented by their trustee, and need not be made parties; see the late Chancery Rules, No. 24, and the late Exchequer Rules, No. 16.

See further as to parties, *ante*, p. 296, *et seq.*

**Frame of bill
by trustee or
by creditor.**

Where a suit is instituted by the trustee, or by one or more creditors on behalf of all, to have the trusts of a composition deed or agreement carried into effect, the bill usually sets forth the composition deed or agreement, and what proceedings have been taken under it; and if there be any creditors who have not executed within the time specified, or otherwise complied with its terms strictly, the bill charges, that by their subsequent acts such creditors have assented, and are bound, and prays that the trusts may be carried into effect, and that plaintiffs, and the other creditors who shall prove their demands, may have the full benefit thereof, and that an account may be taken of the sums due to plaintiffs, and the other creditors; and in case the subject of the trust be land, that a sale or mortgage may be made of the trust estates, and that a Receiver be appointed in the meantime to receive the rents, collect the debts, &c.; and that the fund, when realized, may be distributed among the creditors as the court shall direct. In *Field v. Lord Donoughmore*, *sup.* (2 Dru. & Wal. 630), where the plaintiff had repudiated the deed in the first instance, and proceeded at Law to recover his full demand, the bill alleged that it was pretended, inasmuch as the plaintiff did not execute the deed of trust in the life-time of the debtor he was not entitled to the benefit thereof, and charged in reply, that although plaintiff at first refused to execute, being apprehensive that the deed was not sufficiently binding on the trustee, yet that he was always desirous to conform to the provisions thereof, and that his claim having been submitted to arbitration, the acting trustee, under advice of counsel, permitted him to execute, &c.

**Frame of bill
by debtor.**

When the bill is filed by the debtor to compel a particular creditor to accept and abide by the trusts of the composition deed, and to restrain him

from proceeding on his original security, it states any proceedings that may have been taken by the defendant at Law to enforce his original demand, and prays an injunction against such proceedings. *Vide Mackenzie v. Mackenzie, sup.* (16 Ves. 372).

Where there has been a secret agreement between the debtor and a particular creditor, a bill may be filed either by the debtor, or by the trustee, or by one or more of the general creditors, against the fraudulent creditor, and in cases where there is a trustee who is implicated, against him also, praying payment to the trustee named in the composition deed of the difference between the sum due to the fraudulent creditor, according to the rate compounded for, and the sum received by him under his secret agreement, and praying also that the securities fraudulently obtained by him may be delivered up to be cancelled; *Vide Eastabrook v. Scott, sup.* (3 Ves. 456); *Fawcett v. Gee*, 3 Anstr. 910.

Frame of bill
against a fraudulent creditor.

It only remains to notice the subject of costs in suits relating to compositions, as to which the rule seems to be the same as that adopted in creditors' suits, and therefore a creditor instituting a suit to carry into effect the trusts of a composition deed, and succeeding in such suit, is entitled to his costs out of the funds, according to the priority of his demand; *Taylor v. Gorman*, 1 Dru. & Wal. 235, n.; save the costs of making out title, which will be paid in priority to the claims of the other creditors; *Kelly v. Kelly*, 1 Ir. Eq. R. 317; *Ex Maguire v. Dundass, sup.* (1 Ir. Eq. R. 25), *ante*, p. 59.

Costs.

In a suit of this nature the trustee, whether plaintiff or defendant, if he have conducted himself properly, is entitled to his costs as between Solicitor and client, in priority to the demand of the plaintiff or of any of the creditors; but he may forfeit or even render himself liable to the payment of costs, and that even where he may have acted *bonâ fide* and under an erroneous impression of duty; *Earl of Lucan v. La Touche, sup.* (2 Dru. & Wal. 271).

BILLS TO ENFORCE EXECUTION OF COMPOSITION AND TRUST DEEDS.

Bill by Trustee under a Deed of Trust for Payment of Creditors.

To the, &c.

In Chancery.

William Styles
seised in fee.

1st Jan. 1802,
made fee-farm
grant to defend-
ant, the debtor.

HUMBLY complaining, sheweth unto your Lordship, your suppliant, John Jones, of, &c., that William Styles being seised in fee-simple or otherwise well entitled of or to the lands of *Grange*, situate, &c., on the 1st day of January, 1802, executed an indenture of that date, made between the said William Styles, of the one part, and James Thompson of, &c., one of the confederates hereinafter named, of the other part, whereby the said William Styles, for the considerations therein expressed, released and conveyed, in manner therein mentioned, unto the said James Thompson, his heirs and assigns, the said lands of *Grange*, with the appurtenances thereunto belonging, to hold the same unto the said James Thompson, his heirs and assigns, for ever, at the yearly rent of £36 sterling, and under and subject to the covenants, provisos, and agreements in the said indenture of fee-farm grant contained, on the tenant's or lessee's part and behalf to be performed and observed; as by such indenture, reference, &c. [*State the title of the debtor to Cloone and Rosemount, the lands comprised in the trust deed*].

Mortgage to
defendant,
Uniacke.

And your suppliant further sheweth, that on or about the 1st day of June, 1839, the said James Thompson executed an indenture of that date, made between the said James Thompson of the one part, and Thomas Uniacke, of, &c., of the other part, whereby,

after reciting the said several indentures of, &c. [*the leases under which Thompson held*] and that the said James Thompson was indebted to the said Thomas Uniacke in the sum of £1500, in consideration of the said sum of £1500, so due by the said James Thompson, he, the said James Thompson, did convey and assign, in manner therein mentioned, the said lands of *Grange, Cloone, and Rosemount*, comprised in the said several therein recited indentures, unto the said Thomas Uniacke, his heirs, executors, administrators, and assigns, according to the respective natures or legal qualities thereof, as to the said lands of *Grange and Cloone*, for all his the said James Thompson's estate and interest therein respectively, and as to the said lands of *Rosemount*, for the term of 99 years, to be computed from the 1st day of May, 1839, at the yearly rent of a peppercorn, but by way of mortgage only, for the purpose of securing the payment by the said James Thompson to the said Thomas Uniacke of the principal sum of £1500, with interest for the same at the rate of six pounds *per cent. per annum*, at the time therein mentioned, and long since past.

And your suppliant further sheweth, that the said Thomas Uniacke, under and by virtue of the said indenture of mortgage and otherwise by judgment obtained by him against the said James Thompson, claims to be, and in fact is interested in the said lands and premises therein comprised.

And your suppliant further sheweth, that on the 28th day of December, 1840, the said James Thompson executed an indenture of that date, made between the said James Thompson of the one part, and Robert Murray and Thomas Hewitt, two of the public officers of the society or copartnership called the Provincial Bank of Ireland, of the other part. [*State mortgage to Murray and Hewitt of lands of Rosemount, to secure £1200 to the Bank, with interest at six pounds per cent. per annum, and that Murray and Hewitt claim to be, and are interested under said mortgage in the lands therein comprised, and then proceed thus*] :

Further mortgage to defendants, Murray and Hewitt.

And your suppliant further sheweth, that the said James Thompson having become embarrassed in his pecuniary circumstances, and having become further indebted to various persons by judgment and recognizance, the said James Thompson, on the 2nd day of May, 1842, executed an indenture of that date, made between

2nd May, 1842, trust deed :

James Thompson, first part ;
 plaintiff, second part ;
 creditors who should execute,
 third part ;
 reciting the title of James
 Thompson to said lands,
 and that he was indebted to the
 creditors in schedule,
 in the sums,
 upon the securities therein.

Conveyance to
 plaintiff,

upon trust,

to receive the
 rents,

and sell.

the said James Thompson of the first part, your suppliant of the second part, and the several persons creditors of the said James Thompson who were executing parties thereto, of the third part, whereby, after reciting the said [*leases*], and after further reciting that the said James Thompson was indebted to the several persons named in the schedule thereunto annexed, in the several sums of money set opposite to their respective names, and which sums of money were respectively secured in the manner set forth in the said schedule, and that in order to provide a fund for the payment of the said several debts of the said James Thompson, he, the said James Thompson had agreed to convey and assign the said several lands and premises therein recited, according to his interest therein respectively, unto your suppliant, upon the trusts therein and hereinafter declared thereof, he, the said James Thompson, for the purpose of carrying the said agreement into effect, did convey and assign, in manner therein mentioned, the said lands of *Grange*, *Cloone*, and *Rosemount*, comprised in the said [*leases*], for all his, the said James Thompson's, estate and interest therein respectively, unto and to the use of your suppliant, his heirs, executors, administrators, and assigns, according to the respective natures or legal qualities thereof, but upon and for the several trusts, intents, and purposes, and with, under, and subject to the several powers and provisos therein and in part hereinafter declared and contained of and concerning the same, that is to say, upon trust, or to the intent that your suppliant, or other the trustee or trustees for the time being of the now stating indenture, of his or their own proper authority, and without any further consent or concurrence of the said James Thompson, his heirs, executors, administrators, or assigns, should immediately after the execution of the now stating indenture, enter into the possession or receipt of the rents and profits of the said several lands and premises thereby released and assigned respectively, and should, whether having previously so entered or not, at any time or times after such period, at his or their discretion, absolutely sell and dispose of the said lands and premises thereby released and assigned, or intended so to be, with their appurtenances, or any part or parts thereof, either by public sale or by private contract, or by both of such means, in such lots, parcels, and manner as he or they should think fit, without the

consent or concurrence of the said James Thompson, his heirs, executors, administrators, or assigns, unto any persons whomsoever, for the best price or prices in money that could or might be reasonably obtained for the same, and should and might for that purpose enter into, make, and execute all necessary contracts with and conveyances to the purchaser or purchasers thereof, or as he or they should direct, with full power to make sale and dispose of the said lands and premises, or any part thereof, subject to such conditions or condition of sale as he or they, in his or their discretion, should think fit, and with liberty to reserve a bidding or biddings upon any such sale or sales by public auction, and also to resell, in manner aforesaid, any of the said lands and premises which might be contracted to be sold, but which contracts should not afterwards be completed, and to deal with respect to such first contracts, and the deposits and damages therein, as he or they should think fit.

And it was thereby agreed and declared between and by all the parties thereto, that all and every the said conveyances and assurances, acts, deeds, matters, and things which should be made, done, and executed by your suppliant, or other the trustee or trustees for the time being of the now stating indenture, of and concerning the premises thereby authorized to be sold as aforesaid, or any of them, should be as valid and effectual in the Law, though the said James Thompson, his heirs, executors, or administrators, should not execute or assent to the same, as the same would have been if he or they had duly executed or assented to the same, and that the receipt or receipts in writing of your suppliant, or of the trustee or trustees for the time being, acting in execution of the trusts of the now stating indenture, should be a sufficient and effectual discharge or discharges to any purchaser or purchasers of all or any part of the same lands and premises for his, her, or their purchase-money or monies, or so much thereof as should be thereby acknowledged to have been received, and that such purchaser or purchasers, his, her, or their executors, administrators, or assigns, should not afterwards be answerable or accountable for the loss, misapplication, or nonapplication, or be in anywise obliged or concerned to see to the application of or to the necessity of raising the money in such receipt or receipts acknowledged to be received, or any part thereof.

Power to give
discharges for
proceeds of
sale.

And it was thereby agreed and declared between and by the par- Application of

purchase-mo-
ney, and of rents
until sale.

1. To pay head
rents, &c.

2. To pay costs
of executing the
trusts,

including costs
of a suit, if ne-
cessary,

and including
£100 to plain-
tiff for his trou-
ble.

3. To pay the
debts in sche-
dule.

4. To pay sur-
plus to the
debtor.

ties thereto, that your suppliant, or the trustees or trustee for the time being of the now stating indenture, should stand and be possessed of and interested in the monies to arise from such sale or sales of all or any part of the said lands and premises thereby authorized to be sold as aforesaid, and the rents and profits thereof until the same premises should be sold, upon and for the trusts, intents, and purposes following, that is to say: in trust, in the first place, to pay and discharge all head-rents, rates, taxes, charges, and impositions that might be then due and owing out of or in respect of the said lands and premises, or any of them; and in the second place to pay and satisfy, or retain to himself and themselves thereout, all costs, charges, and expenses of and attending the making out title to the said lands, or any part thereof, and all costs, charges, and expenses of and attending such sale or sales, or otherwise to be incurred in the execution of the trusts thereby reposed in him or them, including the costs of preparing the now stating indenture, and the charges and expenses which he or they should respectively incur in or about any suit or suits that should or might be instituted by the trustee or trustees for the time being of the now stating indenture, for obtaining the direction of a Court of Equity, if it should be deemed expedient, as to carrying the trusts of the now stating indenture into execution, pursuant to the power for that purpose therein and hereinafter contained; and also to pay himself the sum of £100 as compensation for his loss of time, and trouble for acting as trustee to the now stating indenture, pursuant to the request, and in accordance with the proposal of the said James Thompson, at a meeting held in the town of Youghal, on the 25th day of April, 1842.

And after all the aforesaid rents, rates, taxes, and impositions, costs, charges, and expenses should be wholly paid and satisfied, then, in trust, in the next place, to pay and satisfy the several debts of the said James Thompson, comprised in the schedule thereunto annexed, or thereunder written, and all interest and costs then due and owing in respect of the same.

And after all the aforesaid rents, rates, taxes, charges, impositions, and expenses, scheduled debts, interest, and costs should be wholly paid and satisfied, then in trust to pay over the residue or overplus of the said trust-monies to arise by the means aforesaid, unto the said James Thompson, his executors, administrators, or

assigns, for his and their own benefit ; and in case any part of the said lands and premises thereby conveyed should remain unsold under the trusts aforesaid, then in trust, after all the said rents, taxes, costs, and expenses, scheduled debts, and interest should be fully paid and satisfied, to re-convey or re-assign such remaining part of the said lands and premises unto the said James Thompson, his heirs, executors, administrators, or assigns, or as he or they should order and direct, for his and their own benefit.

And for the purpose of more effectually carrying the aforesaid trusts into effect, the said James Thompson did thereby give and grant unto your suppliant, or other the trustees or trustee for the time being of the now stating indenture, full power and authority to pay and discharge the debts or sums of money due and owing by the said James Thompson, comprised in the said schedule, and all interest due in respect of the same, and any other debts and costs necessary to be discharged in order to make title to the said lands, or any part thereof, upon such evidence as they or he should think proper, and also to adjust and settle all accounts, reckonings, claims, and demands whatsoever in anywise relating thereto, and to make and enter into such composition or compositions in respect of the same debts, interest, and costs, as to him or them should appear fair and expedient, and, if necessary, to join in referring to arbitration all disputes and differences which might arise upon or in respect of such accounts, claims, and demands, or any of them.

And in the now stating indenture was contained a proviso, and it was thereby agreed and declared between and by the parties thereto, in case the monies to arise from the sales of all the said lands and premises thereby authorized to be sold as aforesaid, and the rents issues, and profits thereof, until the said premises should be so sold, should be insufficient to discharge and satisfy the several trusts aforesaid, so as to admit of a good and marketable title being deduced to the said lands and premises by the trustee or trustees for the time being acting under the trusts of the now stating indenture, or if by reason of any other circumstance or matter such trustee or trustees should be precluded or hindered from executing the trusts aforesaid, that it should and might be lawful for your suppliant, or the trustees or trustee for the time being, of the now stating indenture, to institute in this honourable Court

Proviso.

Plaintiff at liberty, if necessary, to institute suit for execution of the trusts.

such suit or suits as to them or him should seem expedient, or as they or he should be advised, for the purpose of carrying into effect the trusts aforesaid, and of applying the produce of the sales of the said lands and premises, so far as the same would extend, in payment of the said scheduled debts, in a due course of priority; and for the purpose of enabling such trustee or trustees to proceed in an effectual and inexpensive mode with such suit or suits, if the same should be necessary, that it should and might be lawful for such trustee or trustees to cause an appearance or appearances to be entered, and any answer or answers that might be requisite, to be filed for the said James Thompson, and for that purpose to employ Counsel and Solicitor, and that the costs so incurred on behalf of, or at the instance of such trustee or trustees, should, with his or their other costs, be paid out of the proceeds of the said lands and premises when sold.

And in the now stating indenture was also contained a power of appointing new trustees, or a new trustee, and a provision for the indemnity of your suppliant or any such future trustees or trustee.

Copy schedule
to deed, annex-
ed to bill.

And your suppliant further sheweth, that the schedule hereunto annexed, and hereunder written, and which your suppliant craves may be taken and considered as part of this his bill of complaint, is similar and in all respects corresponds with the said schedule annexed to the said indenture of the 2nd day of May, 1842.

Endorsement
on deed,

As by said indenture, reference being thereunto had, may appear.

And your suppliant further sheweth, that by a deed-poll, or instrument in writing, endorsed on said last stated indenture, and bearing date the 12th day of September, 1842, under the hand and seal of Thomas Uniacke, one of the creditors of said James Thompson named in said last stated indenture and schedule, the said Thomas Uniacke declared and agreed that his being placed No. 1 in the schedule to said deed, and as claiming under the judgments obtained against said James Thompson in Michaelmas Term, 1818, and Michaelmas Term, 1830, therein mentioned, should not, in any way whatever, be taken as a statement or admission of the priority of said Thomas Uniacke in respect of said securities, nor should such declaration be taken as a waiver of any priority the said Thomas Uniacke might have, arising from said judgments and the mortgage dated the 1st June, 1839, under which he claimed, said

saving rights
of mortgagee.

Thomas Uniacke intending to rest on said securities alone, in support of any priority he might have, and not any statement, direct or implied, contained in said deed, or the schedule thereto annexed; as by a reference to the said instrument, may more fully appear.

And your suppliant sheweth, that Simon Bagge and William H. Coppinger, two of the creditors of the said James Thompson, who have obtained judgments against the said James Thompson, declined or refused to execute such indenture, although they have been applied to by or on behalf of your suppliant to execute the same, and that they have taken proceedings against the said lands, or some of them, for the purpose of enforcing payment of their said debts, and that the said Simon Bagge and William H. Coppinger, under and by virtue of such proceedings, have procured the appointment of a Receiver to receive the rents and profits of the said lands of *Grange, Cloone, and Rosemount*.

Bagge and Coppinger, two of the creditors, refused to execute,

and are now in possession.

And your suppliant further sheweth, that your suppliant, upon or immediately after the execution of the said indenture of the 2nd day of May, 1842, proceeded to take the necessary measures for effecting a sale of all the said lands and premises comprised in said indenture, by public auction, and for that purpose had an abstract of title and conditions of sale investigated and prepared, and had advertisements for the sale of the said lands and premises, in several lots or parcels, on the 28th day of July, 1842, inserted in the public papers, but that notwithstanding all the exertions of your suppliant in that behalf, and although the said several lands and premises comprised in the said indenture of the 2nd day of May, 1842, were in fact, on the said 28th day of July, 1842, set up and offered for sale, at the Commercial Buildings, in the city of Dublin, yet that the said lands and premises, or any part thereof, were or was not sold, and that your suppliant hath incurred and been put to considerable costs and expenses in, about, and concerning the premises, exceeding the sum of £120 in the whole.

Ineffectual attempt at private sale.

And your suppliant further sheweth, that he hath lately discovered, as the fact is, that a considerable arrear of head-rent, taxes, and charges, was due at the time of the execution of the said indenture of the 2nd day of May, 1842, and still continues due in respect of the lands and premises therein comprised, and that if all the said lands and premises comprised in the said indenture of the 2nd day

Fund deficient. of May, 1842, were sold, the monies to arise from the sales or sale thereof would not be sufficient to pay off and discharge the amount of the head-rents, taxes, and charges now due in respect of the said lands and premises, the expenses incurred by your suppliant in execution of the trusts of the said indenture of the 2nd day of May, 1842, and the several creditors of the said James Thompson comprised in the said schedule hereunto annexed, the full amount of their respective debts; and that consequently, and inasmuch as two of the creditors of the said James Thompson have not only refused to execute the said indenture of the 2nd day of May, 1842, but have also declined to execute any deed of release exonerating the said lands and premises comprised in the said indenture of the 2nd day of May, 1842, from their respective debts, in the event of the money realized by the said sale or sales of the said lands and premises not extending to pay to them the amount of their respective debts, interest, and costs, in full, a good and marketable title cannot be deduced by your suppliant to the said lands and premises comprised in the said indenture of the 2nd day of May, 1842.

Refusing creditors will not release,

unless paid ;

so that title cannot be made out of Court,

notwithstanding applications of plaintiff. And your suppliant further sheweth, that your suppliant, under the circumstances aforesaid, and wishing to save expense, hath, both by himself and his agents, frequently, and in a friendly manner, applied to the said scheduled creditors of the said James Thompson, requesting them to consent that the produce of the said sales or sale should, after payment of all costs, charges, and expenses incidental to the said sale or sales, be applied by your suppliant, so far as the same would extend, in payment of the said scheduled debts, interest, and costs, in a due course of priority, in such and the like manner as if a suit were instituted in this honourable Court for the sale of the said lands and premises, and a sale had thereunder, and the produce realized thereby distributed under the decree of this honourable Court, but without effect.

So that plaintiff cannot execute the trusts without aid of the Court. And your suppliant further sheweth, that by reason of the premises, your suppliant has been, and is prevented and hindered from executing the trusts of the said indenture of the 2nd day of May, 1842, without the indemnity of a Court of Equity.

Combination. But now so it is, may it please your Lordship, that the said Thomas Uniacke, Robert Murray, and Thomas Hewitt, Simon Bagge and William H. Coppinger, combining and confederating together and with the said James Thompson, and with divers other

persons to your suppliant at present unknown, whose names, when discovered, your suppliant craves leave to insert herein, with apt words to charge them as parties defendants hereto, require payment in full of their respective debts, and decline to consent that the produce of the said sales or sale shall, after payment of all arrears of rent, taxes, charges, and all costs and expenses incidental to the said sales or sale, be applied by your suppliant, so far as the same will extend, in payment of the said scheduled debts, interest, and costs, in a due course of priority.

And the said James Thompson sometimes pretends, that there are ^{Pretences.} or is divers or some mortgages, charges, or incumbrances, or mortgage, charge, or incumbrance, other than and beside the mortgages, charges, and incumbrances mentioned in the schedule hereunto annexed, upon or affecting the lands and premises in the said indenture of the 2nd day of May, 1842. But your suppliant charges the contrary thereof to be the truth, and that there are not nor is any mortgages, charges, or incumbrances, or mortgage, charge, or incumbrance upon or affecting the said lands and premises, other than and beside the mortgages, charges, and incumbrances mentioned and set forth in the said schedule, and that so it would appear if the said James Thompson would set forth and describe, as he is hereby required to do, what such other mortgages, charges, or incumbrances, or mortgage, charge, or incumbrance are or is, and by whom the same were or was made or created, and in whom the same are or is now vested, and for what considerations or consideration, but which he refuses to do.

And your suppliant further charges, that the said defendants, or some or one of them, now have, or hath, or had lately, in their, or his possession, custody, or power, divers or some deeds, tenants' leases, documents, papers, or writings, or some deed, tenant's lease, document, paper, or writing, of or relating to or touching or concerning the said lands and premises comprised in the said indenture of the 2nd day of May, 1842, or some of them, whereby the truth of the several matters aforesaid, or of some of them, may appear, and that the said several defendants should set forth as they are hereby respectively required to do, a list or schedule, or short description of all such deeds, tenants' leases, documents, papers, or writings, or deed, tenant's lease, document, paper, or writ-

ing, and when, and in what place, and in whose possession, custody, or power, the same and every of them are or is, but which they respectively decline to do.

General aver-
ment.

All which actings, doings, and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your suppliant in the premises.

In consideration whereof, and forasmuch as your suppliant is remediless in the premises save in a Court of Equity where matters of this sort are properly cognizable and relievable.

Interrogating
part.

To the end, therefore, that the said defendants may, if they can, shew why your suppliant should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say,

1. Whether the said William Styles, being seised or otherwise well entitled of or to the lands of *Grange*, did not execute such indenture as hereinbefore mentioned to bear date the 1st day of January, 1802, between such parties, and of such date, purport, and effect respectively, as hereinbefore in that behalf mentioned, or how otherwise?

2. Whether [*interrogate in like manner as to the execution of the leases of lands of Cloone and Rosemount*].

3. Whether the said James Thompson did not execute such indenture as hereinbefore mentioned to bear date the 1st day of June, 1839, between such parties, and of such date, purport, and effect respectively, as hereinbefore mentioned, or how otherwise, and whether the said Thomas Uniacke, under and by virtue of the said indenture of mortgage, and otherwise by judgments obtained by him against the said James Thompson, does not claim to be, and is he not in fact interested in the lands and premises comprised in said last-mentioned indenture; and let the said Thomas Uniacke state and set forth particularly what interest he claims in said lands and premises, and how he makes out such claim, and how much, if any thing, is due to him by the said James Thompson?

4. Whether [*interrogate in like manner as to mortgage to Provincial Bank*].

5. Whether the said James Thompson did not execute such indenture as hereinbefore mentioned to bear date the 2nd day of May, 1842, between such parties, and of such date, purport, and effect respectively, as hereinbefore mentioned, or how otherwise? And whether the schedule hereunto annexed is not similar, and does not correspond in all respects with the schedule to the said last mentioned indenture annexed, or, if not, wherein does it differ therefrom?

6. Whether such deed poll, or instrument in writing as hereinbefore mentioned to bear date the 12th day of September, 1842, was not endorsed on said last-mentioned deed, under the hand and seal of the said Thomas Uniacke, of such date, purport, and effect respectively, as hereinbefore mentioned, or how otherwise?

7. Whether some and which of the creditors of the said James Thompson have not declined or refused to execute said indenture of the 2nd day of May, 1842, and whether such creditors were not severally applied to by your suppliant to execute said deed, and did not they decline to execute same, or how otherwise?

8. Have not some and which of the creditors of the said James Thompson taken some and what proceedings, for the purpose of enforcing payment of their debts out of the lands and premises comprised in said deed of the 2nd day of May, 1842, or out of some and what part of said lands and premises, and have not the said Simon Bagge and William H. Coppinger, under and by virtue of such proceedings, or how otherwise, obtained a Receiver over the rents and profits of the said lands of *Grange, Cloone, and Rosemount*, or some and which of them, at their respective suits, or how otherwise?

9. Did not your suppliant, upon or immediately after the execution of the said indenture of the 2nd day of May, 1842, take such necessary measures as hereinbefore in that behalf mentioned, for effecting a sale, by public auction, of the lands and premises comprised in said deed, by preparing an abstract of title and conditions of sale, and inserting advertisements for the sale of said lands, in lots or parcels, in the public papers, on the 28th day of July, 1842, as hereinbefore mentioned, and were not said lands and premises in fact set up and offered for sale on the said 28th day of July, 1842,

at the Commercial Buildings, in the City of Dublin, and did not your suppliant, notwithstanding his said exertions, fail in effecting the sale thereof, and did he not incur such costs and expenses in and about the said premises amounting to such sum as hereinbefore mentioned ?

10. Was there not, at the time of the execution of the said indenture of the 2nd day of May, 1842, and is there not still, a considerable, or some and what arrear of head-rent, taxes, and charges due in respect of the lands and premises therein comprised, and if all the lands and premises comprised in said indenture were sold, would not the monies arising from the sale or sales thereof be insufficient to pay off and discharge the amount of such head-rents, taxes, and charges, now due in respect of said lands and premises, and of the expenses incurred by your suppliant in execution of the trusts of the said indenture of the 2nd day of May, 1842, and the several creditors of the said James Thompson comprised in the said schedule hereunto annexed the full amount of their respective debts and therefore, and by reason of the refusal of several of the creditors of the said James Thompson to execute a deed of release, exonerating the lands and premises comprised in said indenture of the 2nd day of May, 1842, will not your suppliant, in the event of the proceeds of the sale of the said lands and premises not extending to pay the said several scheduled creditors the amount of their respective debts, interest, and costs, in full, be unable to deduce a good and marketable title to the said lands and premises comprised in said indenture of the 2nd day of May, 1842 ?

11. Hath not your suppliant made such applications to the said scheduled creditors of the said James Thompson to consent to the produce of the said sale or sales, after payment of all costs, charges, and expenses incidental thereto, being applied by your suppliant, so far as the same would extend, in payment of said scheduled debts, interest, and costs, in a due course of priority, in manner hereinbefore mentioned ? and have not said creditors refused to comply with such requests, and why have they so refused ? and is not your suppliant, by reason of such refusal, prevented from executing the trusts of said indenture of the 2nd day of May, 1842, without the aid of a Court of Equity ?

Prayer.

And that the trusts of the said indenture bearing date the 2nd

day of May, 1842, or so much or such parts thereof as are now capable of taking effect, may be established and carried into effect under the direction of this Court, as between the parties who have executed the said indenture; and that an account may be taken of the several lands and premises comprised in the said indenture, under what title or titles the same are held, and in whose possession are the said lands; and also an account of the rents and profits of said lands, and by whom received since the date of said indenture, and of the head-rent and other outgoings now due and in arrear for and in respect of the same; and of the costs, charges, and expenses properly and necessarily incurred by your suppliant in making out title to the several lands and premises, and in relation to the sale thereof so as aforesaid attempted to be made by your suppliant; and of the costs incurred in preparing the said indenture, and in relation to the trusts thereof, including the sum of £100 as a compensation for the time and trouble of your suppliant in the premises as trustee of the said indenture of the 2nd day of May, 1842; and that an account may be taken of the several debts of the defendant James Thompson specified in the schedule annexed to the said indenture; and of what is due and owing on foot thereof respectively for principal, interest, and costs, and in whom the same respectively are now vested; and also an account of all charges and incumbrances affecting the said lands and premises, or any part thereof, and of their respective priorities, your suppliant being willing to redeem such of the said charges as your Lordship shall deem him bound to redeem; and that the said lands and premises comprised in the said indenture bearing date the 2nd day of May, 1842, may be sold by and under the direction and decree of this honourable Court, and that all proper parties may be ordered to join in such sale, and in executing all proper conveyances and releases of the said lands and premises to the purchaser or purchasers; and that the produce of such sale may be applied, under the direction of this Court, pursuant to the trusts and provisions of the said indenture of the 2nd day of May, 1842; and that in the mean-time the Receiver so as aforesaid appointed to receive the rents and profits of the said lands at the suit of the said defendants, Simon Bagge and William H. Coppinger, may be extended to this your suppliant's suit; and that your suppliant may

That trusts of the deed of composition may be executed as between the parties thereto.

Account of the lands therein, and of the rents of said lands; of the head-rent, &c.; and of the costs incurred by plaintiff as trustee,

including the sum allowed plaintiff for compensation for his trouble.

Account of the scheduled debts,

and of all charges, and their priorities.

Offer to redeem prior mortgages. Sale.

Application of the produce of sale.

That Receiver may be extended.

General relief. have such further and other relief in the premises as to your Lordship shall seem meet. May it please, &c.

Pray subpoena to appear and answer against

James Thompson, [*the debtor*].

Thomas Uniacke, }
Robert Murray, } [*prior mortgagees*].
Thomas Hewitt, }

Simon Bagge, } [*judgment creditors in possession, not*
Wm. H. Coppinger, } *parties to the trust deed*].

Note.—The defendant James Thompson is required to answer all the interrogatories.

The defendant Thomas Uniacke is required to answer interrogatory numbered 3.

The defendants Robert Murray and Thomas Hewitt are required to answer the interrogatory numbered 4.

The defendants Simon Bagge and William H. Coppinger are required to answer the interrogatories numbered 7 and 8 respectively.

See *Harvey v. Lawlor*, 3 Dru. & War., 168.

For bill by a creditor, see 2 Dru. & Wal. 630 ; 1 Dru. & War., 227.

Bill by Debtor to restrain a Creditor from enforcing his original Security after having agreed to accept a Composition.

To the, &c.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant, John Jones, of, &c.

Plaintiff,
a trader,

That in and previously to the year 1840, your suppliant carried on the trade or business of a wholesale stationer, in the city of Dublin.

Your suppliant further sheweth, that having sustained divers losses

and misfortunes in his said trade, and having become indebted to divers persons, and being unable to discharge said debts, some time in the month of June, 1840, your suppliant called a general meeting of his creditors, for the purpose of laying before them the state of your suppliant's affairs, with a view to the adjustment and settlement thereof.

became indebted.

Convened a meeting of his creditors.

Your suppliant further sheweth, that such meeting was accordingly held on or about the 1st day of July, 1840, in Radley's coffee house, in the city of Dublin aforesaid, and the greater part of your suppliant's creditors, including James Thompson, the confederate hereinafter named, attended such meeting.

Defendant attended.

Your suppliant further sheweth, that your suppliant attended the said meeting, and laid before his creditors then present, a general statement and account of his affairs, whereupon it was unanimously resolved and agreed by and between your suppliant and his said creditors, that in consideration that your suppliant would, on or before the 1st day of July, 1841, pay to each of his said creditors a dividend after the rate of ten shillings in the pound, in respect of his said debts, your suppliant's said creditors would receive such dividend in lieu and full satisfaction and discharge of their said debts, and would thereupon deliver up to your suppliant, to be cancelled, the securities held by them respectively therefor.

Agreement for composition.

Your suppliant further sheweth, that articles of agreement in writing, bearing date the said 1st day of July, 1840, and made between your suppliant of the one part, and the said several creditors of your suppliant who attended said meeting, of the other part, were thereupon prepared, and by said articles, after reciting the said agreement hereinbefore set forth, it was expressly declared and agreed, that your suppliant and the several persons whose names were thereunto subscribed did thereby promise and undertake to and with each other, to do any other lawful act whatever for ratifying, confirming, and establishing the aforesaid agreement. [*State the articles fully*]. As by the said agreement, which is now in your suppliant's possession, ready to be produced, will appear.

Articles of agreement.

Your suppliant further sheweth, that said articles of agreement were signed by your suppliant, and by all the creditors of your suppliant who attended said meeting, including the said confederate James Thompson.

Signed by plaintiff and creditors, including defendant.

Composition
deed in pursu-
ance of articles.

Your suppliant further sheweth, that in pursuance of said agreement, by indenture bearing date on or about the 20th day of July, 1840, and made between your suppliant of the one part, and the several persons whose names are contained in the schedule thereunto annexed, of the other part. [*Recite composition deed made in pursuance of and in conformity with the articles.*]

As by said indenture, &c.

Executed by
plaintiff and by
the other cre-
ditors, but not
by defendant.

who is a credi-
tor by bond of
plaintiff.

Your suppliant further sheweth, that the said indenture was executed by your suppliant and the several creditors of your suppliant whose names are contained in the schedule thereunto annexed, except the said confederate, James Thompson, who, at the time of the execution of said articles and deed respectively, was and still is a creditor of your suppliant to the amount of £50, for which the said confederate holds the bond or obligation in writing of your suppliant, under his hand and seal, in the penal sum of £100 conditioned for the payment of £50, with interest thereon.

Plaintiff paid
the composition
before the day
limited, to all
the creditors
save defendant;

and tendered
the composition
to defendant.

Your suppliant further sheweth, that within the time specified by the said articles of agreement, in that behalf, and before the said 1st day of July, 1841, your suppliant paid to his said several creditors who executed said articles of agreement and indenture respectively, except the said James Thompson, a dividend of ten shillings in the pound, on their several debts; and your suppliant, within the time aforesaid, and on or about the 20th day of June, 1841, tendered to the said James Thompson the sum of £25, being a dividend of ten shillings in the pound on the said debt of £50, and a further sum of £10 for interest thereon, making together the sum of £60 due by your suppliant to him the said James Thompson, as aforesaid.

And your suppliant hoped that the said James Thompson would have accepted such dividend in discharge and full satisfaction of his said debt, and would not have molested your suppliant in anywise in relation thereto.

Combination.
Pretences.

But now so it is, &c. *ante*, p. 17.

And the said James Thompson, at times, pretends that he did not execute said articles of the 1st day of July, 1840, or in any other manner agree to accept of any dividend or composition in lieu or satisfaction of the debt owing to him from your suppliant, and therefore he refuses to accept such dividend or composition, and insists on being paid the whole of the debt originally owing from your suppliant to him the said James Thompson.

Whereas your suppliant charges that the said James Thompson did execute the said articles of agreement, and although he did not at any time execute the said indenture of the 20th day of July, 1840, yet his not having executed the same was casual and accidental, and he would have executed same at the time of the execution thereof by the other creditors, if application had been made to him for that purpose. Charging part.

And your suppliant further charges, that said indenture is in all respects conformable to the said articles of agreement; but, nevertheless, under such and the like pretences as aforesaid, or some others equally unjust, the said defendant refuses to accept such dividend or composition.

And the said defendant hath filed a declaration against your suppliant, upon your suppliant's said bond, in her Majesty's Court of Queen's Bench in Ireland, for the full amount of his said original debt, and will shortly obtain judgment thereon, unless restrained by the injunction of this honourable Court. Defendant is proceeding at Law on his bond against plaintiff.

To the end, therefore, &c. *ante*, p. 309. [*Interrogate fully to all the statements and charges in bill in such manner as in preceding precedent, and proceed thus*]: Interrogating part.

And that the said defendant may answer the premises, and that the said agreement contained in the said articles bearing date the 1st day of July, 1840, may be carried into specific execution as against the said defendant, your suppliant being ready and willing, and hereby offering to perform his part thereof; and that, if necessary, it may be referred to one of the Masters of this Court to inquire whether the said deed of composition bearing date the 20th day of July, 1840, is conformable to the said articles, and if not, to settle a proper deed of composition; and that an account may be taken of the sum due and owing to the said defendant on foot of the composition of his said debt, your suppliant hereby offering to pay the sum which shall appear to be due on foot thereof; and that on payment thereof the said defendant may be decreed to release your suppliant from his said debt, and to deliver up the said bond to be cancelled; and that in the mean time the said defendant may be restrained by the order and injunction of this Court from proceeding at Law against your suppliant on foot of his said bond; and that your suppliant may have, &c. Prayer.
That the agreement for composition may be executed;
and, if necessary, that a deed may be settled.
Account of sum due to defendant for composition of his debt, which plaintiff offers to pay; the defendant thereupon to release plaintiff and cancel the bond.
Injunction against law proceedings
General relief.

[*Pray subpoena to appear and answer against the defendant.*]

Prayer of Bill filed by a Debtor and the Trustee under a Composition Deed, against a Scheduled Creditor who had secretly procured from the Debtor a Bond to secure the Balance of his Debt, after deducting the Composition.

Prayer.

That defendant may refund the sum received by him *extra* the amount of the composition.

Account of sum received by defendant out of the trust fund.

That defendant be restrained from proceeding on his scheduled debt ;

and that he may deliver up the bond fraudulently procured by him ;

and may be restrained from proceeding on foot thereof.

General relief.

And that the said defendant may answer the premises, and that the said defendant may be decreed to repay to your suppliant, as such trustee as aforesaid, the sum of £50, being the difference between the sum received by him out of the estate and effects of your suppliant [*the debtor*], and the amount of 5*s.* in the pound upon his scheduled debt, with interest ; and for that purpose that an account may, if necessary, be taken of the sums received by the said defendant on foot of the said debt, out of the estate and effects of your suppliant [*the debtor*], comprised in the said indenture of the, &c., and thereby conveyed and assigned to your suppliant [*the trustee*], as trustee in said indenture ; and that the said defendant may be restrained from proceeding at Law against your suppliant on foot of his said scheduled debt, or the securities therefor.

And that the said defendant may be decreed to deliver up the said bond bearing date the 1st day of May, 1836, in order that the same may be cancelled ; and that in the meantime he may be restrained from proceeding at Law on foot of the said bond ; and that all proper accounts may be taken, and all necessary directions given ; and that your suppliant may have such further and other relief in the premises as to your Lordship shall seem meet.

May it please, &c.

[*Pray subpoena to appear and answer against the fraudulent creditor, sole defendant*].

Prayer of Bill by Creditor against Trustee under Composition Deed, seeking to have the Benefit of said Deed.

And that the said indenture of the 5th day of April, 1836, may be established, and the trusts thereof performed and carried into execution, by and under the direction of this honourable Court, so far as relates to your suppliant and the other unpaid creditors of the said James Thompson, who signed same ; and that your suppliant and the other creditors of the said James Thompson who shall come in and prove their demands under said indenture, may have the full benefit thereof, according to their respective priorities and rights ; and that an account may be taken of the sums due and owing to your suppliant and the other unpaid creditors of the said James Thompson, on foot of their respective demands; and that the said defendant [*the trustee*], or such other person as shall appear liable thereto may be directed, out of the first monies that shall come to his hands, applicable to the payment thereof, to pay to your suppliant and the other unpaid creditors of the said James Thompson, the sums which shall be so found due to them respectively, according to their several priorities, and according to the provisions of the said trust deed ; and that, if necessary, the said lands of *Grange* comprised in the said indenture of the 5th day of April, 1836, may be decreed to be sold for the purposes aforesaid, and that all proper parties may be decreed to join in such sale ; and that all proper accounts may be taken, and, in particular, an account of all charges affecting the said lands, and of their priorities.

That trusts of deed may be enforced.

Account of sums due to creditors.

Payment according to the provisions of the trust deed.

Sale.

Account of charges.

And that in the meantime a Receiver may be appointed to receive the rents and profits of the said lands of *Grange*, that same may be paid into Court from time to time by such Receiver, for the benefit of your suppliant and the other persons entitled under the said indenture of the 5th day of April, 1836 ; and that all proper and necessary directions may be given. [*And for further relief, &c.*]

Receiver.

See 2 Dru. & Wal. 635.

BILLS FOR PARTITION.

PRELIMINARY DISSERTATION.

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	<i>Proceedings under 5 Geo. II. c. 9.</i>
	<i>Affidavit of Service under preceding Act.</i>
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Partition at
common Law.

At the common Law, coparceners might have been compelled to make partition by writ *de partitione faciendâ* ; and the Stat. 33 Hen. VIII. S. 1, c. 10, Ir. (corresponding to the 31 Hen. VIII. c. 1 ; and the 32 Hen. VIII. c. 32, Eng.), gave the right of issue a writ of partition to joint-tenants, and tenants in common, as well of estates of inheritance, as for terms of lives, or years.

Before the last-mentioned Act, joint-tenants might have *voluntarily* partitioned estates of freehold by deed, but not otherwise ; Litt. S. 290 ; Co. Litt. 187, *a* ; and tenants in common might have made partition by parol, without deed, if, as to corporeal estates, they afterwards perfected the partition in severalty by livery of seisin, Co. Lit. 169, *a* ; and joint-tenants for years might have made partition by parol without deed ; Co. Litt. 187, *a*. "The Statute of Frauds," however (7 Will. III. c. 12, Ir., corresponding to the 29 Car. II. c. 3, Eng.), made a *writing* necessary in all cases.

The relief afforded by Courts of Equity in cases of partition, was much more perfect and extensive than could be obtained at law ; and the power peculiar to those courts, of making compensation where it might be required, and adjusting according to the equitable, as well as legal rights of all parties interested, is, of itself, abundantly sufficient to account for the fact, that long before the writ of partition was abolished, it had been superseded in practice, by the commission of partition, obtained upon bill filed in a Court of Equity, for that purpose : and now the Statute 3 & 4 Will. IV. c. 27, s. 36, has abolished the writ of partition.

Writ of partition became obsolete, and is now abolished.

"In the case of a partition of an estate," observes Lord Redesdale, (Mitf. Pl. 4 ed. 120), "if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common Law have led to applications to Courts of Equity for partitions, which are effected by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required, and upon return of the commission, and confirmation of that return by the Court, the partition is finally completed by mutual conveyances of the allotments made to the several parties. But if the infancy of any of the parties, or other circumstances, prevent such mutual conveyances, the decree can only extend to make the partition, give possession, and order enjoyment accordingly, until effectual conveyances can be made, *Hollingworth v. Sidebottom*, 8 Sim. 620. If the defect arise from infancy(*a*), the infant must have a day to shew cause against the decree after attaining twenty-one ; and if no cause should be shewn, or cause shewn should not be allowed, the decree may then be extended to compel mutual conveyances.

Proceedings in Equity to obtain partition.

"If a contingent remainder, not capable of being barred or destroyed, should have been limited to a person not in being, the conveyance must be delayed until such person shall have come into being, or until the contingency shall be determined, in either of which cases a supplemental bill will be necessary to carry the decree into execution. An executory devise may occasion a similar embarrassment."

An unequal partition will not bind an infant, unless confirmed by him ; Litt. s. 258.

Unequal partition will not bind an infant.

Partitions at Law and in Equity differed in these respects : the first operated by the judgment of a Court of Law and delivering up possession in

Distinction between partition as formerly at Law, and partition in Equity.

(*a*) The Statute 1 Will. IV. c. 47, s. 10, has not altered the law, as above stated, in cases of partition, *Price v. Carver*, 3 Myl. & Cr. 157.

Partition at Law was by judgment of the Court :

partition in Equity is by conveyance, and the Court will ascertain who are entitled with plaintiff.

In Equity partition is in analogy to Law.

The first decree directs partition.

The second decree directs conveyances,

the shares of the parties having been ascertained by the Court.

In a partition suit there must be a co-owner plaintiff, and a co-owner defendant ;

and plaintiff must shew his title.

pursuance of it, which concluded all the parties to it, vesting the legal estate by the partition, and the plaintiff was obliged to give strict proof of the title, both his own and the defendant's. All parties to the judgment, even those under disability, were concluded by such judgment, and the delivering of possession in pursuance thereof; *Whaley v. Dawson*, 2 Sch. & Lef. 372.

Partition in Equity proceeds upon conveyances to be executed by the parties; and if the parties be not competent to execute the conveyances, the partition cannot be effectually had, for by the partition the equitable right only is vested; *Whaley v. Dawson*, *supra*; *Miller v. Warmington*, 1 Jac. & W. 493. Nor can any remedy be had under the "Trustee Act," for the Statute 1 Will. IV. c. 60, s. 18, provides, that the Act shall not extend to cases upon partition.

When the plaintiff shews his own title, a Court of Equity will assist him by directing an inquiry to ascertain who are entitled with him; *Agar v. Fairfax*, 17 Ves. 533.

But in Equity the bill for partition is in analogy to the proceeding at Law. The first judgment at Law was "*Quod partitio fiat*," and on the return of the writ, the final judgment was pronounced "*Quod partitio prædicta firma et stabilis teneatur in perpetuum*." So in Equity the practice now is, that the decree, directing a partition, and directing that a commission shall issue for the purpose, and declaring the proportions in which the parties are entitled, reserves further directions; and upon the return of the Commissioners' certificate, the cause is heard on further directions, and a final decree pronounced directing mutual conveyances.

If necessary, the Court, in decreeing a partition, will give special instructions to the Commissioners; *Story v. Johnson*, 2 Y. & Col. (Ex.), 586. If there be any uncertainty as to the interest of the parties, a reference will, in the first instance, and previously to granting a commission, be directed to ascertain them, for this is the province not of the Commissioners, but of the Court; *Agar v. Fairfax*, *sup.* (17 Ves. 533); 1 Mad. 214. Each party is entitled to the rents of his separate allotment, or to interest on money awarded for owelty of partition, from the confirmation of the Commissioners' return; *Stewart v. Ferguson*, H. & J. 452; S. C., 5 Ir. Eq. R., 157.

In a partition suit the plaintiff and the defendant should each be a party beneficially interested in the lands to be divided; hence when a bill seeking a partition was filed by two *cestui que trusts*, tenants in common, as plaintiffs, against their trustee, as defendant, the Court declined to make the decree sought for, on the ground that there was no defendant to litigate the right to a partition, the trustee being a mere stakeholder; *Lowe v. Franks*, 1 Mol. 137.

The plaintiff in a partition suit must shew his own title by his pleading and proof, otherwise his bill will be dismissed; *Jope v. Morshead*, 6 Beav. 213. But as he is not bound to know who are his co-tenants, the same strictness in pleading and proving the title of the defendants is not required; *Baring v. Nash*, 1 Ves. & B. 551. An inquiry will, if necessary, be directed, as we have already observed, to ascertain who are the parties entitled together

with the plaintiff, and what are their respective shares of the estate; *Agar v. Fairfax*, 17 Ves. 552.

The manner in which Courts of Equity carry into effect their decrees for partition by enforcing the execution of conveyances, makes it necessary that the persons in whom the legal estate is vested should be before the Court; *Miller v. Warmington*, *sup.* (1 Jac. & W. 484); *Whaley v. Dawson*, *sup.* (2 Sch. & Lef. 372): unless the legal estate be vested in persons claiming by title paramount, as, for example, a mortgagee of the entire estate of the lands to be divided; *O'Reiley v. Vincent*, 2 Mol. 330; *Swan v. Swan*, 8 Price, 518; for such mortgagee would not be required to convey to either plaintiff or defendant.

Persons having the legal estate necessary parties.

Unless the legal estate be vested in a paramount mortgagee, &c.

Persons having right of common over the estate are not proper parties in the suit, for their right will remain the same after the partition had as before; *Agar v. Fairfax*, 17 Ves. 544.

It is no objection to a partition that parties may subsequently come in *esse* who will be entitled to a share, but in that event the whole process will have to be commenced over again; *Wills v. Slade*, 6 Ves. 498; *Gaskell v. Gaskell*, *sup.* (6 Sim. 643).

Partition may be, though a co-owner be not yet come in *esse*.

See the decree upon a bill of revivor and supplement in a partition suit; *Herbert v. Lord Beerhaven*, 5 Ir. Eq. R. 23.

It seems sufficient if the parties who are necessary for the purpose of conveying the estate be before the Court at the second hearing; *Slator v. Wilson*, 2 Mol. 522.

Parties to convey not necessary at first hearing.

If the title of the plaintiff be clear, he is entitled to partition as a matter of right, however minute be his share; *North v. Guinan*, Beatty, p. 344; and no objection on the ground of the inconvenience or difficulty of effecting the partition will be listened to; *Parker v. Gerard*, Amb. 236, 589; *Baring v. Nash*, 1 Ves. & B. 551; *Hobson v. Sherwood*, 4 Beav. 184.

Partition is as of right, although plaintiff's share be small, and partition difficult;

But the Court, in decreeing a partition, will put the plaintiff under such terms as justice requires; for example, in a proper case the Court will direct an account of sums expended by the defendant in improvements made necessarily, or with the plaintiff's consent; so, on the other hand, the Court will, if necessary (as in a case where the defendant has received more than his share), direct an account of the rents and profits received by the defendant; *Lorimer v. Lorimer*, 5 Mad. 363; and will sometimes give a Receiver, although, as a general rule, a Receiver will not be granted as between tenants in common, unless in case of exclusion, viz., where one tenant in common receives the whole rent, and excludes his companion from the share due to him; *Tyson v. Fairclough*, 2 S. & Stu. 142; *Spratt v. Ahearn*, 1 Jones, 50.

but plaintiff seeking equity must do equity; e. g., allow defendant for improvements.

Account of rents may be had, and a Receiver.

Where the plaintiff in a partition suit has a life estate in a fifth of the land, determinable upon his marriage, he is entitled to a decree for partition against the owners of the remaining four-fifths, but the latter may, if they please, continue to hold their four-fifths undivided; *Hobson v. Sherwood*, *sup.* (4 Beav. 184).

Tenant for life may have partition,

So, a tenant for life, with remainder to his unborn sons in tail, may obtain a decree for partition which will bind his sons when they come in *esse*;

- and conveyance subject to uses of his settlement. Lessee for years may have partition.
- Partition of advowson.
- Stat. 1 Geo. II. c. 23.
- Effect of commissioners being equally divided as to their return. Duty of commissioners.
- Appointment of commissioners, when parties differ, is given to the Master. Powers of commissioners.
- Frame of bill for partition.
- Gaskell *v.* Gaskell, *sup.* (6 Sim. 643); Wills *v.* Slade, *sup.* (6 Ves. 498.) But in a case of this kind, where a share has been the subject of a settlement, the allotment will be decreed, and the conveyance made, subject to the uses of the settlement. So also, lessee for years of an undivided part may have partition without bringing the reversioner before the Court; Baring *v.* Nash, *sup.* (1 Ves. & B. 551).
- Upon bill filed for partition of an advowson a decree is made directing alternate presentations to the benefice, but no commission issues; Boddycoate *v.* Steers, 1 Dick. 69. See form of prayer of such bill, *post*, p. 550.
- The order of presentation among co-tenants is usually according to their seniority; any difficulty on the subject is settled by a reference to the Master.
- The Statute 1 Geo. II. c. 23, s. 7, 1r. (7 Anne, c. 18, Eng.), enacted, that if coparceners, joint-tenants, or tenants in common be seised of any estate of inheritance in the advowson of any church, or vicarage, or other ecclesiastical promotion, and a partition be made between them to present by turns, every one shall thereupon be taken and adjudged to be seised of his separate part of the advowson to present in his turn. This Act is made perpetual by the Statute 13 Geo. II. c. 4.
- Under a commission of partition to four commissioners, and two different returns, the commissioners being equally divided, the Court cannot act upon either returns, but will grant a new commission to five commissioners, and the proper course is to move to quash the first return; Watson *v.* Duke of Northumberland, 11 Ves. 153. The commissioners should all meet together, not struggle for separate interests, but endeavour to make an impartial division. Their office is judicial rather than ministerial; Manners *v.* Charlsworth, 1 Myl. & K., 330. But their adjudication will be set aside not only for partiality, but also for a gross error of judgment; Story *v.* Johnson, 1 Y. & Col. (Ex.) 538.
- To save expense, the Court will sometimes direct a commission to a smaller number of commissioners than there are parties interested in the partition, and will order, that if the parties do not agree in their choice of commissioners, the Master shall choose them of his own authority; Story *v.* Johnson, *supra*.
- With respect to the powers of the commissioners; see the case of Lister *v.* Lister, 3 Y. & Col. (Ex.) 540. As to the practice in proceeding under a decree for partition, *vide* 2 Daniell's Ch. Pr. 769, *et seq.*; 1 Smith's Ch. Pr. 477, *et seq.*
- A bill for partition should state accurately the plaintiff's title; 3 Sw. 139, note (b), 17 Ves. p. 552; and should state the defendant's title, so far as the plaintiff may be acquainted therewith. It should shew where the legal estate is vested, and also in what right the several parties to the suit are brought before the Court, and having, in the charging part, anticipated and answered any objections to a partition that may have suggested themselves, and having interrogated to the stating and charging parts of the bill, it should pray, that a partition may be made between the plaintiff and defendant, and that a commission may issue for that purpose, and that the parts allotted to the plaintiff may be duly conveyed to him according to his

interest therein, free from incumbrances of the other parties, to be enjoyed by him in severalty, and that all proper parties may join in conveyances, and that possession of their several parts may be delivered to each party respectively, and that the title-deeds relating to the lands allotted, may be deposited in Court for the benefit of the plaintiff and all other persons interested, and that after the making of the partition such of the title deeds as relate to the several allotments may be delivered to the respective persons entitled thereto. It sometimes also contains a prayer for a Receiver to collect the rents for the use of the several persons interested, until the partition can be effected, and a prayer for an account of rents received by defendants.

In partition suits, the parties respectively are to abide their own costs up to the time of issuing the commission; but the costs of issuing the commission (and in the Exchequer the costs of enrolling the first decree), and all subsequent proceedings, are to be borne by the parties in proportion to their respective shares in the premises; *McBride v. Malcolmson*, 2 Dru. & Wal. 700; *Brunker v. Sterne*, 1 Hayes & Jones, 410; and see *Monyns v. Joad*, 4 Y. & Col. (Ex.) 134; *Greer v. Mercer*, 4 Ir. Eq. R. 705.

Costs.
General rule.

Extra costs incurred by unsuccessful opposition to a partition, will be thrown on the opposing defendant; *Morris v. Timmins*, 1 Beav. 411; *Hill v. Fullbrook*, Jac. 574. Where a co-owner devised his undivided part to A. for life, remainder to B. in tail, charged with legacies, it was held that the tenant for life, remainder-man, and legatee should each bear their own costs, as incident to the estate or interest given to them respectively by the will; *Greer v. Mercer*, *sup.* (4 Ir. Eq. R. 705). But, as a general rule, each co-owner must pay the costs of incumbrancers upon his share; *Cornish v. Guest*, 2 Cox, 27.

Extra costs
caused by
resistance.

Costs of incum-
brancers.

Now, indeed, it would seem that no such costs need be incurred, for these incumbrancers would seem to be parties whose rights are not sought to be disturbed by the partition, who are brought before the Court for the plaintiff's purposes, but without seeking any direct relief against them, or to their prejudice, and therefore need not be served with *subpoenas*, but only with notice under the late Rules, at least unless the legal estate be vested in them.

Upon the hearing of a suit for partition, the Court will, if required, award a commission of perambulation; *Beatty*, 342, Vern. & Scr. 112. See *Smith's General Rules* 1 (ed. 1839); and see *Lowry's Exch. Rules* (ed. 1838), 109, n. (a).

Commission of
perambulation.

Various conjectures have been formed as to the origin of the interference of Courts of Equity in the case of confusion of boundaries. It may be sufficient here, however, to observe, that Courts of Equity will not interfere by granting a commission to settle boundaries upon a case of mere confusion, unless some equity has been superinduced by the acts of the parties which will warrant the interposition of the Court; *Wake v. Conyers*, 2 Cox, 362; *Atkyns v. Hatton*, 2 Anstr. 386; *Speer v. Crawter*, 2 Mer. 417; *Willis v. Parkinson*, 1 Swanst. 9: for instance, it is a common equity to interfere by granting a commission in cases where a tenant has, through

Commission to
settle bounda-
ries
not granted in
every case of
confusion of
boundaries.

Special case
must be made.

negligence, confounded his landlord's property with his own, since the relation subsisting between him and his landlord makes it the duty of the tenant to preserve and protect the boundaries; *Attorney-General v. Fullerton*, 2 Ves. & B. 263.

In *Miller v. Warmington*, *sup.* (1 Jac. & W.) at p. 491, Sir Thomas Plumer, M. R. observes: "In every bill praying a commission to ascertain boundaries, it is first necessary to shew clearly, that without the assistance of the Court, the boundaries cannot be found." And again, "*Speer v. Cawter* (*sup.* 2 Mer. 410), has settled, that you must lay a foundation for this species of relief not merely by shewing that the boundaries are confused, but that the confusion has arisen from some misconduct on the part of the defendant, or those under whom he claims, of which you have a right to complain, and which renders it incumbent on him to co-operate in re-establishing them. But the Court will not interfere between independent proprietors, and confusion of boundaries *per se*, is no ground to support such a bill" (a).

So, if the confusion of boundaries have been occasioned by fraud, that alone will constitute a sufficient ground for the interference of the Court; *Rous v. Barker*, 3 Bro. P. C. 180; and if the fraud be established, the Court will by commission ascertain the boundaries, if practicable, and if not practicable, will do justice between the parties by assigning reasonable boundaries, or setting out lands of equal value, *Speer v. Cawter*, *sup.* (2 Mer. 418); *Grierson v. Eyre*, 9 Ves. 345; *Duke of Leeds v. Earl of Strafford*, 4 Ves. 180, in which the form of a decree for a commission to ascertain boundaries is given.

Form of decree
in suits to settle
boundaries.

The decree in a suit to settle boundaries does not order mutual conveyances, as in the case of a partition, but directs that after the lands, &c., shall have been set out, the defendant shall deliver possession thereof to the plaintiff, and that the plaintiff and his heirs may hold and enjoy the same against the defendant, or any person or persons claiming under him; *Lord Abergavenny v. Thomas*, Seton on Decrees, 202.

Costs therein.

Although no certain rule has been laid down as to the question of costs in cases of this nature, it would seem that where there is no default on either side, and the interests are considerable on both sides, the costs are to be borne equally, *Norris v. Le Neve*, 3 Atk. 82. But if there have been default, or misconduct, the Court would probably punish it by making the defaulting party pay the costs. *Vide Metcalfe v. Beckwith*, 2 P. Wms. 376.

8 Geo. I. c. 5.

The Statute 8 Geo. I. c. 5, Ir., enacted, that if any proprietor, occupier, or tenant of any lands in the kingdom, should be desirous to make ditches or fences between his, her, or their lands and holdings, and the

(a) See *Fitzgerald v. Lord Norbury*, cited in argument in *Kelly v. Shelton*, 1 Jones, 537, where it was stated that upon bill filed for partition of waste lands, an objection was taken to the jurisdiction of the Court to entertain such a bill, and the Chancellor yielded to the objection so far as to compel the plaintiff to present a petition under the 5 Geo. II. c. 9, whereupon Sir A. Hart, C., made an order in the cause and matter, for a commission to issue.

lands next contiguous, where no dispute should have been for three years then last past about the mears between the said lands, &c., and where no sufficient fences, or only dead and dry fenceless ditches there should be, the proprietor, occupier, or tenant of such neighbouring lands, on reasonable request, should be at equal expense in making between such lands, &c., good ditches, &c. (as therein specified); and if any such proprietor, &c. of any neighbouring lands should refuse to settle and ascertain the mears and bounds, in order to have fences made as aforesaid, he should be compellable by bill in Equity, or commission of *perambulation*, to ascertain such mears, &c.

The mode of proceeding under this Act is by bill, or by a *petition* stating the petitioner's title, and also that others claim some interest in the lands, &c. to be divided, and praying that a commission may issue to divide same, according to the claims of the several parties. The petition must be supported by an affidavit of the facts, when a conditional order will be granted, which must be personally served on the defendants (or respondents, as the case may be), and tenants in possession, and if no cause be shewn, the order will be made absolute, and a commission will be issued accordingly. See *White v. Buckingham*, Smith's G. O. p. 2 (ed. 1839), n. (1). Proceedings thereunder.

The 5th Geo. II. c. 9, Ir., enacted, that where any person or persons should be seised or possessed of any lands contiguous or adjoining to any bog, moss, or lough, or to ground between the flux and reflux of the sea, and should be desirous to settle and ascertain the mears and bounds thereof with the proprietors of the other lands adjoining to or on the other side or sides of the same, such person or persons might exhibit an English petition in His Majesty's high Court of Chancery, or Court of Exchequer, in this kingdom, against the proprietor or proprietors of the other part or parts of such bog, &c., or of the lands adjacent to the same, desiring such mears and bounds to be ascertained as aforesaid; and upon proof made by affidavit of such proprietors, and the tenants in possession being personally served with copies of such petition at least thirty days before the time appointed for hearing the matter thereof, it should be lawful for the Court in which such petition was exhibited, to issue a commission to seven or more commissioners (for which commission the like fees should be paid as for a commission to examine witnesses, and no more), empowering and requiring such commissioners, or any five or more of them, by examination of witnesses on oath (to be administered by them), and by the verdict of a jury of twelve men to be returned on the precept of such commissioners by the Sheriff of the county in which such lands should lie, or if they should lie in two counties then one equal moiety of such jury to be returned out of each of such counties by the several Sheriffs thereof, to inquire of and ascertain the old mears and bounds of such bog, &c., if there should be any such; but if no such old mears or bounds should appear to them, then to make, lay out, and ascertain such reasonable mears and bounds between the petitioners and other proprietors in the petition mentioned, regard being had to the length of the profitable land adjoining to such bog, &c., belonging to such several proprietors, as to them or the major part of them should seem rea- 5 Geo. II. c. 9.

sonable (with power to lay out drains when necessary, and apportion the expense thereof amongst the proprietors), and whatever should be done by virtue of such commission, the said commissioners, or the major part of them should return under their hands and seals, into the Court out of which such commission should have issued (such return to be confirmed, altered, amended, or set aside, as the Court should think fit); and such return confirmed, altered, or amended by the Court, and any order thereupon made should bind and be conclusive to all the parties to the said proceedings, and all persons claiming or deriving any estate, right, title, or interest in or to the said lands, or any part thereof, by, from, or under them, or either of them.

Proceedings
under.

The reader will find the form of a petition under this Act, in How. Eq. Ex. 678. (See also 1 Law Rec. N. S. 188). It should state the title of the petitioner, and the existence and locality of the bog, &c.; and should also set forth the several lands which surround it, with the names of the persons who are owners of the inheritance; and should further state, that part of the bog, &c., is the estate of the petitioner, and the other part, of the respondents, and that encroachments have been made on the petitioner's part, as the case may be; and having stated the usual applications to have the mears examined and ascertained, and refusals by the respondents, it should pray a commission directed to proper commissioners, to inquire into and ascertain the ancient mears and bounds of the said bog, &c., and if no such mears or bounds should appear, then to make and ascertain such reasonable mears and bounds between the estates of the petitioner and respondents as they should think fit. The petition must be supported by an affidavit of the facts, and upon the respondents and tenants in possession being personally served with a copy, thirty days at least before the hearing, upon motion, on notice, the Court will order the respondents to return commissioners' names within a week after the service of the order, or the officer to settle them and a commission to issue for that purpose.

If the parties served with a copy of the petition, answer and contest it, the Court will hear it as a cause before the commission issues, and will make such order therein as from the circumstances of the case may seem fit.

Form of affidavit
under the
Act.

The copy of the petition is in the nature of original process, and service of it upon a respondent out of the jurisdiction is bad; *Keon v. Lord Kilmorey*, 1 Jones, 153; S. C. 3 Law Rec. O. S. 178; and the affidavit of service must state that there were no other parties in possession of the premises than those served; *Westropp v. M'Donnell*, 1 Jones, 619.

A reversioner in fee, expectant on a lease for lives renewable for ever, is a *proprietor* within the meaning of the Act, and must be served with a copy of the petition; *Kelly v. Shelton*, 1 Jones, 555.

The practice as to proceedings under the above Act is the same in the Courts of Exchequer and Chancery, Anon. 3 Law Rec. N. S. 41.

Commission to
ascertain bound-
aries.

A commission to settle boundaries partakes very much of the same nature as a commission of partition. It is nearly in the same form, and issued out, executed, and returned in the same manner; 2 Dan. Ch. Pr. 785.

BILLS FOR PARTITION.

Bills by two Coparceners against a third, for Partition of Lands, &c.

To the, &c.

In Chancery.

Humbly complaining, shew unto your Lordship, your suppliants Jane Jones of, &c. and Anne Jones, of, &c.

That John Jones of, &c. deceased, the late father of your suppliants, and also of Sarah Jones, of, &c. the defendant hereinafter named, was, in his life-time, and at the time of his death, seised in fee simple of and in ALL THAT AND THOSE, &c.

And being so seised, the said John Jones departed this life in the year 1840, intestate, leaving your suppliants and the said Sarah Jones, their sister, his three daughters and only children and co-heiresses, him surviving; and upon his death, the said lands, hereditaments, and premises descended upon and came to your suppliants and the said Sarah Jones, as such co-heiresses.

Your suppliants further shew unto your lordship, that ever since the death of their said father, your suppliants and the said Sarah Jones have been and now are severally seised in fee of and in the said lands, hereditaments, and premises, in three equal undivided parts or shares, as tenants in coparcenary.

Your suppliants further shew unto your Lordship, that they have frequently applied to and requested the said Sarah Jones to join and concur with your suppliants in making a fair, just, and equal partition of the said premises between them, in order that their re-

John Jones,
seised in fee,

died intestate,
leaving plain-
tiffs and defen-
dant his only
children and
co-heiresses,
upon whom
lands, &c. de-
scended.

Plaintiffs and
defendant
seised in fee
in three undi-
vided parts as
co-parceners.

Applications.

spective shares and proportions thereof might be allotted, held, and enjoyed, in severalty.

And your suppliants hoped, &c.

But now so it is, &c. *ante*, p. 17.

Pretences.

Partition not
beneficial.

She, the said defendant, absolutely refuses to comply with such your suppliants' reasonable requests, sometimes pretending that it will not be for the benefit of your suppliants and the said defendant, or of either or any of them, to make a partition of the said hereditaments and premises; whereas your suppliants charge, and so the truth is, that a fair, just, and equal partition of the said hereditaments and premises will tend greatly to the benefit and advantage of your suppliants and the said defendant; but the said defendant, under divers frivolous pretences, absolutely refuses to join or concur with your suppliants therein.

All which actings, &c., *ante*, p. 18.

Interrogating
part.

To the end therefore, that the said defendant, Sarah Jones, may, if she can, shew why your suppliants should not have the relief hereby prayed, and may, upon her corporal oath, to the best and utmost of her knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written she is required to answer, that is to say,—

1. Whether the said John Jones was not in his life-time, and at the time of his death, seised in fee simple of and in the several hereditaments and premises hereinbefore mentioned, or how otherwise?

2. Whether being so seised he did not depart this life in the said year 1840, intestate, and leaving your suppliants and the said defendant his three daughters and only children and co-heiresses, him surviving?

3. Whether upon the death of the said John Jones, the said lands, hereditaments, and premises did not descend upon and come to your suppliants and the said defendant as such co-heiresses, or how otherwise?

4. Whether ever since the death of their said father, your suppliants and the said defendant have not been, and are not now severally seised in fee of and in the said lands, hereditaments, and premises in three equal undivided parts, or shares, as tenants in coparcenary, or how otherwise?

5. Whether your suppliants have not made such applications to the said defendant, to join and concur with your suppliants in making a fair and equal partition of the said premises between them, as hereinbefore mentioned, and whether the said defendant did not refuse to comply with your suppliants' said requests, and why hath she so refused?

And that a commission of partition may issue out of and under the seal of this honourable Court, directed to certain commissioners therein named, to divide and allot the said lands, hereditaments, and premises, in equal third parts or shares; and that one full and equal third part or share may be allotted and conveyed to your suppliant, Jane Jones, her heirs and assigns; and one other third part or share, may be allotted and conveyed unto your suppliant, Anne Jones, her heirs and assigns; and that the remaining third part, or share, may be allotted and conveyed to the said defendant, and her heirs and assigns;

Prayer.
That commis-
sion of parti-
tion may issue;

And that your suppliants and the said defendant may severally hold and enjoy their respective allotments of the said hereditaments and premises in severalty;

and several
parties enjoy in
severalty.

And that all proper and necessary conveyances and assurances may be executed for carrying such partition into effect;

Conveyances.

And that the title deeds and writings relating to the said premises may be brought into this honourable Court, and may be preserved and taken care of for the mutual benefit and advantage of your suppliants and the said defendant, and that your suppliants may be at liberty to take copies thereof;

Title deeds
brought into
Court,

And that possession may be delivered to your suppliants of such parts of the said hereditaments and premises as shall be allotted to them respectively; [*and for further relief, &c.*]

and plaintiffs
may take
copies.
That each party
may be put in
possession of a
share.

[*Pray subpoena against Sarah Jones, one of the coparceners, and the sole defendant.*]

The defendant, Sarah Jones, is required to answer the several interrogatories numbered 1, 2, 3, 4, and 5, respectively.

See *ante*, p. 307.

Prayer of Bill for Partition subject to Uses of Settlement, of Shares which have been settled, and for Inquiry as to Shares of the several Parties, Account of Rents, Receiver, &c.

Partition.	And that a partition and division may be made of the said lands and premises.
Commission.	And that a commission may issue forth of this honourable Court, directed to fit and proper commissioners to be therein named for that purpose; and that it may be referred to one of the Masters of this honourable Court to inquire and report what undivided shares your suppliant and the several defendants are entitled to in the said lands and premises.
Inquiry to ascertain the shares.	
Allotment of shares to the parties entitled,	And that the said commissioners may be directed to make a partition of the said lands and premises between your suppliant and the said defendants, according to the shares the Master shall find they are respectively entitled to;
subject to settlements, if any.	And in case the Master, in making such inquiry, shall find that the shares of the said parties, or any of them, are comprised in any settlements, then that the several allotments to be made to them as aforesaid may be made, subject to the uses of such settlements respectively;
Account of rents.	And that an account may be taken of the rents and profits of the said lands and premises since the death of the said testator, into whose hands the same have come, and how applied and disposed of.
Receiver.	And that a proper person may be appointed in the mean time to receive the rents and profits of the said lands and premises, and to apply the same as your Lordship shall think fit.
Conveyance.	And that the particular part of said lands and premises which shall be allotted to your suppliant as his share may be thenceforth held and enjoyed by your suppliant, his heirs and assigns, in severalty, and that the same may be conveyed to your suppliant, his heirs and assigns; and that all proper parties may be directed to join in such conveyance, your suppliant being willing to join in such conveyances and assurances as this honourable Court shall direct, to the several other parties entitled to said lands and premises.
Delivery of title deeds, &c.	And that such of the deeds and writings in the custody or power

of any of the parties, which relate to such part of the premises as shall by such partition be allotted to your suppliant, may be delivered to your suppliant; and that such of the said deeds and writings as concern any other parts of said premises may be delivered to the party to whom the same shall be allotted.

And that the deeds and writings relating to the common title of the said lands may be secured for the benefit of your suppliant and all other persons interested therein; and [*general relief*].

That common title deeds may be secured.

Bill for Partition by one Tenant in Common entitled to one-fourth of Lands, against Tenants of remaining three-fourths and Mortgagees of one-fourth, deducing Titles of the respective Shares.

To the, &c.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant John Jones, of, &c.

That John Styles was in his life-time, and at the time of his death, seised in fee simple, or of some other good estate of inheritance to him and his heirs, of and in ALL THAT AND THOSE the lands of *Grange*, situate, &c.

John Styles seised in fee of lands of *Grange*,

And being so seised, he, the said John Styles departed this life many years since, leaving four daughters his only children and co-heiresses him surviving, that is to say, Jane Styles, Mary Styles, Catharine Styles, and Cecilia Styles, who, upon the death of said John Styles, became seised of the said lands as such co-heiresses as aforesaid.

died, leaving four daughters his co-heiresses.

Your suppliant further sheweth, that the said Cecilia Styles afterwards intermarried with Peter Lawless, Esquire, and had issue by him an only son, Walter Lawless; and the said Cecilia Lawless survived her said husband, and under and by virtue of her marriage settlement, was seised and possessed of one undivided fourth part

Cecilia Styles married W. Lawless and survived him, and was seised of her fourth part for life: remainder to

her son Walter
in fee.

By deed of 2nd
August, 1778,
Walter convey-
ed his one-
fourth to trus-
tees,

to hold to him-
self for life,
remainder to
his wife Catha-
rine for life ;
remainder sub-
ject to a charge
of £300 for
younger chil-
dren (since
paid), to his
first and other
sons in tail
male, reversion
to himself in
fee.

Walter and Ca-
tharine dead,
leaving five
children, of
whom Peter is
the eldest.

of the said lands of *Grange* for her life, with remainder to her son, the said Walter Lawless, and his heirs, and the said Cecilia afterwards died, leaving her son, the said Walter, her surviving.

Your suppliant further sheweth, that by indenture bearing date on or about the 2nd day of August, 1778, and made by and between the said Walter Lawless, of the first part, Patrick Hussey, of the second part, and De Courcy Ireland, of the third part, after reciting among other things, that the said Walter Lawless was seised of an estate in fee simple in reversion expectant on the death of Cecilia or Celia Lawless, widow, his mother, of one undivided fourth part of ALL THAT AND THOSE the four quarters of the lands of *Grange*, situate, &c., and further reciting that no provision had been made by the said Walter, on his marriage with his said wife Catharine Lawless, since dead, and further reciting that the said Patrick Hussey had paid £300 to said Walter Lawless in consideration of a provision to be thereby made for the said Catharine Lawless, his daughter, the said Walter Lawless did convey the said undivided fourth part of the said lands of *Grange*, to hold the same from the decease of the said Cecilia Lawless, to the use of the said Walter Lawless for life, with remainder to the use of the said Catharine Lawless for life, with remainder to the use of the said De Courcy Ireland, his executors and administrators, for the term of 500 years, in trust to raise the sum of £300 for the younger children of the said Walter and Cecilia Lawless, with a proviso for the cessation and determination of the said term upon payment of the said sum of £300, and subject thereto, to the use of the first and every other son of the said Walter Lawless and Catharine his wife, in tail male, with the ultimate remainder to the right heirs of the said Walter Lawless; as by the said indenture, which is not forthcoming, had your suppliant the same to produce, and as by the memorial of the registration of the said indenture will appear.

Your suppliant further sheweth, that the said Walter Lawless and Catharine his wife, are long since dead, and left them surviving five children, issue of the said marriage, that is to say, Peter Lawless, their eldest son, and four younger children, who have been long since paid the said sum of £300 which is no longer an incumbrance affecting the said lands and premises, and the said term has determined by payment of said sum of £300.

Your suppliant further sheweth, that by indenture bearing date on or about the 11th day of April, 1835, and made between the said Peter Lawless of the first part, James Blakeney of the second part, and John Blakeney, junior, of the third part, it was witnessed, that for the purpose of enlarging the estate tail to which the said Peter Lawless was entitled under and by virtue of the said indenture of the 2nd day of August, 1778, and for the considerations therein mentioned, he, the said Peter Lawless, did convey ALL THAT AND THOSE the said one-fourth part of the said lands of *Grange*, and all the estate of the said Peter Lawless therein, to the use of the said Peter Lawless for life, with remainder to the use of the said James Blakeney and his heirs, freed from the estate tail, as aforesaid.

By deed of 11th April, 1835,

Peter Lawless conveyed one-fourth to use of himself for life, remainder to James Blakeney in fee.

As by the said indenture, which was duly registered and enrolled pursuant to the provisions of the Statute in that case made and provided, will more fully and at large appear.

Deed duly enrolled.

Your suppliant further sheweth, that by indenture bearing date on or about the 26th day of August, 1836, and made between the said James Blakeney of the one part, and Matthias Attwood and Moses Montefiore, Trustees of the Provincial Bank of Ireland, of the other part, the said James Blakeney did convey unto the said Matthias Attwood and Moses Montefiore, their heirs and assigns, amongst other lands, the said undivided fourth part of the lands of *Grange*, subject to redemption on payment of the sum of £500, as therein mentioned.

26th August, 1836, James Blakeney conveyed to Attwood and Montefiore, by way of mortgage for £500.

Your suppliant further sheweth, that by indenture bearing date on or about the 24th day of September, 1837, and made between the said James Blakeney of the one part, and your suppliant of the other part, after reciting as therein recited, the said indenture witnessed that the said James Blakeney, for the considerations therein mentioned, did convey unto your suppliant, his heirs and assigns, the said one-fourth part of the said lands of *Grange*, to hold the same from and after the death of the said Peter Lawless.

24th Sep. 1837,

James Blakeney conveyed one-fourth to plaintiff, expectant on death of Peter Lawless.

Your suppliant further sheweth, that by indenture bearing date on or about the 5th day of June, 1841, and made between the said Peter Lawless of the one part, and the said James Blakeney of the other part, he the said Peter Lawless did, for the considerations therein mentioned, convey the said one undivided fourth part of the

5th June, 1841,

Peter conveyed his life estate

to James
Blakeney,

said lands of *Grange* unto the said James Blakeney, his heirs and assigns, to hold the same for and during the life of the said Peter Lawless.

who conveyed
to plaintiff.

Your suppliant further sheweth, that by indenture bearing date on or about the 25th day of September, 1841, and made between the said James Blakeney of the one part, and your suppliant of the other part, the said one undivided fourth part of said lands of *Grange* was conveyed to your suppliant, his heirs and assigns, for and during the life of said Peter Lawless.

Your suppliant further sheweth, that under and by virtue of said several deeds your suppliant is now seised or entitled to him and his heirs, of or to one undivided fourth part of said lands, subject to the said mortgage of the 26th day of August, 1836.

Jane Styles,
another of the
four daughters,
married Smith,
and her fourth
descended to
and is vested
in defendant,
Burke.

Your suppliant further sheweth, that Jane Styles, one of the said daughters and co-heiresses of the said John Styles, afterwards intermarried with a person named Smith, and the undivided fourth part of the said lands of *Grange* of which the said Jane Styles, otherwise Smith, was seised and possessed, hath descended to or hath otherwise become vested in Francis Burke, one of the defendants hereinafter named.

Mary Styles,
another daugh-
ter, married A.
Morris, and
her one-fourth
is vested in de-
fendant, A.
Morris.

Your suppliant further sheweth, that Mary Styles, one other daughter and co-heiress of the said John Styles, afterwards intermarried with one Anthony Morris, and the undivided fourth part of said lands of *Grange* of which the said Mary Styles, otherwise Morris, in her life-time, was seised and possessed, hath descended to or hath otherwise become vested in her great-grandson, Arthur Morris, one of the defendants hereinafter named.

Catharine
Styles, the 4th
daughter, mar-
ried O'Flaherty,
and her one-
fourth vested
in defendant,
A. Skerrett.

Your suppliant further sheweth, that the said Catharine Styles, one other daughter and co-heiress of the said John Styles, afterwards intermarried with a person named Daniel O'Flaherty, and the undivided fourth part of the said lands of *Grange* of which the said Catharine Styles otherwise O'Flaherty, was, in her life-time, seised and possessed, hath descended to or hath otherwise become vested in her great-grandson, Anthony Skerrett, one other of the defendants hereinafter named.

Plaintiff and
defendants
seised in fee,

Your suppliant further sheweth, that your suppliant, together with the said Francis Burke, Arthur Morris, and Anthony Skerrett,

are now severally seised in fee of and in, and are in possession and receipt of the rents of the said lands of *Grange*, in four equal undivided parts or shares as tenants in common.

as tenants in common.

Your suppliant further sheweth, that your suppliant hath frequently applied to the said defendants, and requested them to join and concur with your suppliant in making a fair, just, and equal partition of the said lands and premises between them in order that their respective shares and proportions thereof might be allotted, held, or enjoyed, in severalty, and your suppliant hoped the said defendants would have complied with such reasonable requests, as in justice and equity they ought to have done.

Applications.

But now so it is, may it please your lordship, that the said Francis Burke combining and confederating with the said Arthur Morris and Anthony Skerrett, Matthias Attwood and Moses Montefiore, and with divers other persons at present unknown to your suppliant, whose names, when discovered, your suppliant prays he may be at liberty to insert herein, with apt words to charge them as parties defendants hereto, and contriving how to wrong and injure your suppliant in the premises, he the said Francis Burke and his confederates absolutely refuse to comply with such requests.

Combination.

And they at times pretend that it will not be for the benefit or advantage of the parties interested in said lands, to make an actual partition thereof; whereas your suppliant charges, and so the truth is, that a fair, just, and equal partition of the said lands, hereditaments, and premises, will tend greatly to the benefit and advantage of your suppliant and the said defendants; but they the said defendants, under divers frivolous pretences, absolutely refuse to join or concur with your suppliant therein.

Pretences :
Partition not beneficial.
Charge contrary.

All which actings, doings, pretences, and refusals, &c. (*ante*, p. 18).

General averment.

To the end, therefore (*ante*, p. 309). [*Interrogate fully, and proceed thus*] :

Interrogating part.

And that a commission of partition may be issued out of and under the seal of this honourable Court, and directed to certain commissioners therein to be named, to divide and allot the said lands of *Grange* between your suppliant and all other persons who shall appear to be interested therein; and that for that purpose the parts and shares belonging to your suppliant and all other the parties

Prayer.
That commission of partition may issue.

That the shares of plaintiff and defendants may be ascertained. hereinbefore named, of and in the said lands and premises, may be ascertained and declared, and that the particular part of said lands and premises which shall be allotted to your suppliant as his share may be thenceforth held and enjoyed by your suppliant, his heirs and assigns, in severalty, and that the same may be conveyed to your suppliant, his heirs and assigns, for ever, free from all incumbrances save the said mortgage of the 26th day of August, 1836, and that all proper parties may join in such conveyance; and that possession of such particular part of said lands may be delivered to your suppliant.

Conveyance in severalty to the parties entitled.

Receiver.

And that in the meantime, if necessary, some proper person may be appointed to receive the rents of the said lands.

Title-deeds.

And that all the title-deeds and writings relating to the said lands and premises may be brought into this honourable Court, and there deposited for the benefit of your suppliant and of all other persons interested therein; and that your suppliant may have such further and other relief in the premises as the nature and circumstances of this case may require and to your Lordship shall seem meet &c.

Prayer of Bill for Partition of an Advowson.

Prayer.
Partition.

And that the said defendant may answer the premises, and that a partition may be made of the advowson of the rectory and parish church of *Kells*, in the county of Meath, into moieties between your suppliant and the defendant, Sarah Jones, to present by alternate turns; and that your suppliant and the said defendant, Sarah Jones, may be decreed mutually to execute conveyances to each other, so that your suppliant may hold one moiety of the said advowson to her and her heirs, and that the said defendant, Sarah Jones, may hold the other moiety thereof to her and her heirs, tenants in common, in severalty, respectively;

Mutual conveyances.

And that in such conveyance a clause may be inserted that your suppliant and her heirs, and the said defendant, Sarah Jones, and her heirs, shall present to the said rectory by alternate turns ; <sup>Presentation
by turns.</sup>

And the said defendant, Sarah Jones, having presented upon the last avoidance of the said rectory, that it may be declared that your suppliant do present on the next avoidance thereof ; and that all necessary directions may be given. [*And for further relief, &c.*]

BILLS FOR DOWER.

PRELIMINARY DISSERTATION.

CONTENTS:

<i>Law of Dower in Cases unaffected by the late Act.</i>	<i>only Compensation to the other Claimant.</i>
<i>Requisites to Right of Dower.</i>	<i>Party when relievable against Election made.</i>
<i>Time from which an Estate is affected by Right of Dower.</i>	<i>Legal Remedies for Recovery of Dower.</i>
<i>Inconvenience of Right of Dower.</i>	<i>Grounds of Interposition of Courts of Equity.</i>
<i>Dower, independently of late Act, how barred.</i>	<i>Title of Dower, if disputed, must be tried at Law.</i>
<i>Law of Dower as altered by the late Act.</i>	<i>But if admitted, equitable Jurisdiction concurrent with legal.</i>
<i>Widow put to her Election, when ?</i>	<i>Semble, Purchaser even without Notice takes subject to Dower, in Cases not within late Act.</i>
<i>Doctrine of Election.</i>	<i>Dower how assigned in Equity ?</i>
<i>Dower not excluded save by express Words, or manifest Implication.</i>	<i>Account of mesne Profits decreed in Equity ?</i>
<i>Devise to Widow of certain Lands, no Satisfaction of her Right to Dower out of Residue of Lands.</i>	<i>Statute of Limitations.</i>
<i>Nor Devise to her of Annuity or Rent-Charge, without Evidence of Intention to bar Dower.</i>	<i>Interest on Arrears of Dower, Question for Discretion of Court.</i>
<i>Whether Election involves total Abandonment of the alternative Benefit, or</i>	<i>Costs.</i>
	<i>Frame of Bill for Dower.</i>

Statute to amend law of dower, does not affect widows married before 1st January, 1834,

The Law of Dower has been materially altered by the Statute 3 & 4 Will IV. c. 105.

But the Pleader ought to be acquainted with the Law as it stood before the Act, for the Statute does not extend to the dower of widows married on or before the 1st January, 1834, even as to estates acquired by their husbands after that day.

Nor does the Statute give any force or effect as regards the right of dower, to deeds or wills executed before the above-mentioned day ; s. 14.

The law of dower, in cases not affected by the above Statute, applied only where the husband was *seised* of an estate of inheritance ; and it gave to the surviving wife a right to have assigned to her for her life, one-third of all the lands and tenements whereof he was seised at any time during the coverture.

nor deeds or wills executed before then.

Law of dower in cases unaffected by the late Act.

Hence, to give a title to dower, there must be :

Requisites to right of dower :

1. Marriage, which, if disputed, the fact can only be tried by the Bishop's certificate.

1. Marriage.

2. Seisin during marriage of an estate of inheritance ; the husband must be seised in fee simple, or fee tail, *in possession*.

2. Seisin.

Hence, the widow is not dowable of an estate limited to her husband for life, remainder to another for life, remainder to her husband in fee, for the inheritance was not executed in possession of the husband ; nor of lands held by lease for lives, though renewable ; Watk. Conv. 43 (8th ed.) ; 1 Cru. Dig. 173 (3rd ed.) ; nor of lands let at the time of marriage upon leases for lives, which do not expire during coverture ; D'Arcy *v.* Blake, 2 Sch. & Lef. 387 ; nor of lands contracted to be purchased ; nor of lands mortgaged in fee, prior to marriage, and not afterwards reconveyed ; Park Dow. 136 ; Dixon *v.* Saville, 1 Bro. C. C. 326.

No dower of a trust estate.

In this respect the law of curtesy differs from that of dower, for trust estates are subject to the husband's right by curtesy, although they are exempted from the claim of dower.

But where the lands are let, or mortgaged, or vested in a trustee for a term of years only, the widow shall have her dower, subject to one-third of the prior incumbrances ; Wilkins *v.* Lynch, Hayes, 98 ; Pr. Ch. 250 ; Hitchens *v.* Hitchens, 2 Vern. 404.

If a husband be seised as a mortgagee or trustee, the wife is entitled to dower at Law, but in Equity she takes subject to the trust, and will be dealt with accordingly ; 2 Ves. Sen. p. 634 ; 2 Sug. Vend. (10th ed.) 215 ; Park Dow. 101.

Widow of a trustee is a trustee as to her dower.

The wife shall not be endowed of lands whereof her husband was seised at his death as joint-tenant ; Watk. Conv. 43 (8th ed.)

3. Death of the husband consummates the right of the widow to have her dower lands assigned to her ; it is, however, a right of action only, she is not entitled to take possession, for she has no estate in the lands until the assignment is made by the heir ; 1 Cru. Dig. 178 (3rd ed.) But the right of dower attaches by virtue of the marriage, upon the lands of which the husband is seised, as before-mentioned, and therefore overreaches the husband's post-nuptial conveyances or incumbrances.

3. Death of husband. No estate in the widow before assignment.

The right of dower was found by experience to be of little value as a provision for widows, and yet proved a serious impediment to the transfer of property.

Inconvenience of right of dower.

By the Statute of Uses, 10 Car. I. st. 2, c. 1, Ir. (27 Hen. VIII. c. 10, Eng.) it was enacted, that a jointure before marriage should bar dower at

Dower barred
by jointure ;

Law and in Equity, if made according to the provisions of that Statute ; for which purpose it must be a competent livelihood for the wife, of lands, &c. for her own life at least, given her in lieu of dower, to take effect in possession after the death of her husband ; *Fyan v. Henry*, 2 Dru. & Wal. 556 ; Co. Litt. 36, b. If the jointure be made after marriage, the widow may elect to be endowed, s. 8, but the election is to be made in such case after the right has accrued, and not during coverture, *Frank v. Frank*, 3 Myl. & Cr. 171 ; and if the jointure lands be evicted, the widow shall have dower, s. 6 ; *Irwin v. Irwin*, 5 Ir. Eq. R. 373.

Any provision accepted by an adult female before marriage in lieu of dower, will be deemed a good equitable jointure, and as such, in Equity, a bar to dower ; 2 Sugd. Vend. (10th ed.) 219 ; *In re Herons, Minors*, Fl. & E. 330.

and by convey-
ance to uses to
bar dower.

Jointure settled on an infant before marriage is a bar to dower ; 3 Bro. P.C. 492 ; 9 Jarm. Byth. 92 (2nd ed.) ; 2 Sugd. Vend. (10th ed.) 220. And though the provision be not given in terms in bar of dower, yet Equity may declare it to be so, if that were the intention of the parties ; *Fyan v. Henry*, *sup.* (2 Dru. & Wal. at p. 564. The common conveyance to uses to bar dower (viz., a power of appointment, with, in default of appointment, a limitation to a trustee for the owner's life, interposed between limitations to him for life and in fee), has of late been universally resorted to in order to exclude the right of dower, and probably will not, for some time to come, fall into disuse ; but in order to defeat the claim of dower, whatever be the date of the owner's marriage, the common uses to bar dower are now accompanied by a declaration negating the widow's title to dower.

Law of dower
as altered by
the late Act.

The Act 3 & 4 Will. IV. c. 105, for Amendment of the Law relating to Dower, enacts in substance :—

1. That a widow shall be entitled in Equity to dower of lands to which her husband, at his death, was entitled for an estate of inheritance in possession ; s. 2.

2. A widow shall be entitled to dower of lands to which her husband had only a right of entry or of action, provided such right be not barred by the Statute of Limitations, and provided that she would be dowable of such lands, if her husband had recovered possession thereof ; s. 3.

3. Dower may be barred—

By the husband's disposition of the land, whether by act *inter vivos*, or by his will ; s. 4.

By the husband's declaration in a deed or will, that his wife shall not be entitled to dower ; ss. 6, 7.

By the husband's devise to his wife of any estate or interest in land liable to dower, unaccompanied by a declaration of a contrary intention ; s. 9.

4. Dower postponed to all charges, incumbrances, and debts affecting her husband's estate in the lands.

5. Dower subjected to any restrictions imposed by the husband will.

Thus, in cases regulated by this Statute, the seisin of the husband is not essential to the title of the dowress, for she may be endowed of estates contracted for, and other equitable estates ; but, on the other hand, her right to dower is placed altogether in the power of her husband.

The Law remains unchanged in respect to the widows of joint tenants, trustees, and mortgagees ; 2 Sugd. Vend. 1 (10th ed. 215) ; and a covenant by the husband not to bar the right of dower will be enforced notwithstanding the Act ; s. 11.

It frequently becomes a question with the Draftsman, in preparing a bill for dower, whether the case is such as to put the widow to her election between her dower and some benefit given her by her husband's will. A few observations on the leading principles connected with this subject will, therefore, hardly be deemed out of place here.

Widow put to her election, when ?

The doctrine of election is founded on the principle that a person shall not be permitted to claim under an instrument, whether deed or will, without giving full effect to that instrument in all its parts ; or, as it has been more concisely expressed, that a party cannot accept and reject the same instrument ; *Birmingham v. Kirwan*, 2 Sch. & Lef. at p. 449 ; *Seton v. Smith*, 11 Sim. 59. The rule of election is one of Law as well as Equity, and applicable to every species of instrument, whether deed or will.

Doctrine of election.

The principle on which the doctrine of election is founded of course applies to the claim of dower, and requires that a widow should not have both dower and that which is given in lieu of dower ; but the question is often a difficult one, whether the provision claimed by the widow in addition to dower, was given in lieu of it or not. If the provision result from contract, the question will be simply, whether that was part of the contract ; *Hill v. Hemsworth*, Cas. temp. Plunket, 87 ; but if the provision be voluntary, a pure gift—the intention must either be expressed in the terms of the gift, or must be inferred from the form of it ; *Reynard v. Spence*, 4 Beav. 103 ; and parol evidence to shew the intention is inadmissible ; 4 Dow. 65, 89. See further as to parol evidence ; *Hall v. Hill*, 4 Ir. Eq. R. p. 35 ; *S. C.* 1 Dru. & War. 94 ; 1 Jarm. Dev. 391 ; *Ellis v. Lewis*, 3 Hare, 310.

It is a principle established by authority, that dower, being itself a clear legal right, cannot be excluded by anything short of express words or manifest implication ; 2 Sch. & Lef. p. 452 ; *Hall v. Hill*, *sup.* ; *Ellis v. Lewis*, *sup.* ; and therefore where the case is one of implied intention, the instrument, in order to exclude the right to dower, must contain some provision inconsistent with the assertion of that right ; ignorance on the part of the husband of his wife's being entitled to dower is not sufficient, there must be positive intention to exclude her, appearing on the face of the instrument, something irreconcilable with the widow's claim of dower ; *French v. Davies*, 2 Ves. Jr. 572, 577.

Dower cannot be excluded except by express words, or manifest implication.

In conformity with this principle it has been held, in a case unaffected by the late Act, that a devise to the widow of part of the estate which is subject to her dower, is not a satisfaction of her right to dower out of the resi-

Devise to widow of certain lands, held not

to exclude her right to dower in other lands.

Nor gift to wife of rent-charges and annuities, without some evidence of intention to bar dower.

How far election involves the necessity of forfeiture.

Party not compellable to make election, until relative values have been ascertained.

Election made under mistake as to facts relievable.

Legal remedies for recovery of dower.

Grounds of interposition of Courts of Equity.

due. See 1 Jar. Dev. 397; *Holdich v. Holdich*, 2 Y. & Col. C. C. 18; *Birmingham v. Kirwan*, *sup.* (2 Sch. & Lef. 444); *Roadley v. Dixon*, 3 Russ. 204; *Hall v. Hill*, *sup.* (4 Ir. Eq. R. 36; 1 Dru. & War. 94).

The same principle has been held to apply to cases of rent-charges and annuities devised to the wife, in the absence of manifest intention on the part of the husband to exclude her from dower. See the cases, 1 Jarm. Dev. 405, 406. See also observations of Lord Langdale, M.R., in *Harrison v. Harrison*, 1 Keen, p. 767; and *Hill v. Hemsworth*, *sup.* (Cas. *temp.* Plunket, 87). It seems settled that the gift of an annuity to a widow, out of the property which is subject to her dower, is not a bar to her right of dower; *Hall v. Hill*, *sup.*

The question whether a widow is put to her election between her dower and a benefit given by her husband's will, will not often arise in respect to those married since the 1st January, 1834, on account of the facility of barring their right of dower given by the Statute 4 & 5 Will. IV. c. 105.

We have seen that by section 9 of the Act it is enacted, that a devise by the husband to his widow of any estate or interest in land liable to dower, shall bar her dower, unless a contrary intention shall be declared by the will.

Section 10. Bequest of personal estate, or devise of land not liable to dower, by the husband to his widow, shall *not* bar her dower, unless a contrary intention shall be declared by the will.

The question whether the doctrine of election requires the party electing against the instrument to give up the whole benefit proposed, or only so much as may be sufficient to compensate the disappointed claimant, is one upon which there have been many apparently conflicting decisions. The result of the modern authorities seems to be, that there is not an absolute forfeiture, but only an obligation to make compensation, and that the surplus after such compensation, belongs to the donee; 1 Swanst. 433, n. (a); 1 Story's Eq. Juris. 323; 1 Jarm. Dev. 385-387.

To the foregoing general principles upon the doctrine of election, as administered by Courts of Equity, may be added two others connected with them, viz., that a person called upon to make election between two estates, will not be held bound to do so until their relative values have been ascertained, provided they be not clearly known; *Pusey v. Desbouvrie*, 3 P. Wms. 315; *Chalmers v. Storil*, 2 Ves. & B. 222; and further, that a Court of Equity will relieve against an election made under a mistake as to facts; *Kidney v. Coussmaker*, 12 Ves. 36.

The remedies at law for recovery of dower are the writ of dower *unde nil habet*, and the writ of right of dower; as to which see 1 Roper, Husb. & Wife, 429, *et seq.*; 2 Saunders, R. by Williams, 43 n. (1).

The disadvantages under which a widow labours, in seeking to recover dower at Law, induced Courts of Equity, at a very early period, to afford assistance, not merely by removing trust terms, and otherwise paving the way to establish her right at law, but by giving complete relief when the right to

dower had been ascertained, *Curtis v. Curtis*, 2 Bro. C. C. 620; and see *Strickland v. Strickland*, 6 Beav. at p. 81.

If the title to dower be disputed, Courts of Equity refer the question to the decision of a Court of Law, either by directing an issue to try the fact, *Curtis v. Curtis*, *sup.* (2 Bro. C. C.) at p. 632, or by ordering the bill to be retained for a certain time, with liberty to the plaintiff to bring a writ of dower as she may be advised, *ib.* 620. See Mitf. Pl. 120, *et seq.* (4th ed.)

Right of dower if disputed, must be tried at Law,

If the right to dower be undisputed, Courts of Equity assume jurisdiction concurrently with Courts of Law; and it is therefore unnecessary to charge by the bill that there are impediments in the way of proceeding at Law, although it is usual, and therefore prudent to insert such charge; see argument in *Mundy v. Mundy*, *sup.* (2 Ves. Jr.) at p. 124.

but if not disputed equitable jurisdiction in dower, concurrent with legal.

In cases unaffected by the late Act, the plea of a purchase for valuable consideration, without notice of the marriage, according to the latest authorities, is not a good plea in bar to a widow's bill for dower, on the ground that that defence is of no avail against a legal title, *Williams v. Lambe*, 3 Bro. C. C. 264; *Collins v. Archer*, 1 Russ. & Myl. 284; 1 Story, Eq. Jur. 512, n. (1). But see 3 Sugd. Vend. 496; (10th ed.) *Payne v. Compton*, 2 Y. & Col. (Ex.) 457.

Purchaser without notice takes subject to dower, in cases within the late Act.

The mode in which Courts of Equity exercise their jurisdiction when the right to dower has been established, and the lands subject to dower have been ascertained, is by issuing a commission to assign and set out dower, or directing one of the Masters to assign or set out the dower lands, *Mundy v. Mundy*, *sup.* (2 Ves. Jr.) at p. 125; *Goodenough v. Goodenough*, 2 Dick. 795.

Dower assigned in Equity, how?

Courts of Equity, in assigning dower, give an account of *mesne* profits from the death of the husband, even though the plaintiff or the defendant should die *pendente lite*; *Wakefield v. Child*, 1 Fonb. Eq. 159, n. (k) (5th ed.); *Curtis v. Curtis*, *sup.* (2 Bro. C. C.) at p. 632; *Oliver v. Richardson*, 9 Ves. 222. Before the recent Statute of Limitations there was no limitation as to the recovery of such arrears, but by the 3 & 4 Will. IV. c. 27, s. 41, the recovery of arrears of dower is expressly limited to a period of six years next before the commencement of the action or suit for recovery thereof: see *Smith v. Walsh*, 1 Ir. Eq. R. 167.

Account of mesne profits decreed in Equity.

Statute of Limitations.

Although, as a general rule, interest will not be given upon arrears of dower; *Signal v. Brereton*, 1 Dick. 278; under special circumstances the rule has sometimes been departed from; *Morgan v. Morgan*, 2 Dick. 644; *The Drapers' Company v. Davis*, 2 Atk. 211; *Bicknell v. Brereton*, 2 Ves. Sen. 662; *Stapleton v. Conway*, 1 Ves. Sen. 428; and the question of interest is held to be very much in the discretion of the Court, *Litton v. Litton*, 1 P. Wms. 453; although that discretion is not arbitrary, but to be regulated by the merits of each particular case; *Morris v. Dillingham*, 2 Ves. Sen. 170. See also *Anderson v. Dwyer*, 1 Sch. & Lef. at pp. 303-4; and 1 Roper, Husband and Wife, 457, *et seq.*

Interest on arrears of dower seldom given, but in the discretion of the Court.

The question of costs in suits for dower is regulated in a great measure by the conduct of the parties. But in general where the bill is filed for the

Costs not given to dowress

except in cases
of misconduct
or vexatious op-
position.

single purpose of having dower assigned, if there be no misconduct or vexatious opposition on the part of the defendant, the dowress will not get costs, and the reason assigned is, that no costs are given at Law^(a) upon a writ of dower, Mitf. Pl. (4th ed.) 122 ; but this rule will be departed from in cases where other questions have been raised, and conducted vexatiously, so as to increase costs, *Lucas v. Calcraft*, 1 Bro. C. C. 134; *Worgan v. Ryder*, 1 Ves. & B. 20.

In cases where the claim of dower forms only an ingredient in the suit, and there is a reference to the Master to inquire into other matters also, and to make a general report, the Court, to save the dowress the inconvenience of delay, will sometimes direct the Master to make an immediate separate report of what is due to her for arrears, in order that she may receive them for her maintenance ; *Eccleston v. Berkley*, Ridg. Ca. Temp. Hardw. 253 ; and the defendant will be decreed to deliver possession to the plaintiff of the lands assigned to her, 2 Dick. 795.

Frame of bill.

A bill for dower usually states the plaintiff's marriage, that no settlement was made thereupon, that her husband was seised in fee of divers lands during her coverture, that he died, and that thereupon plaintiff became entitled to dower, but that plaintiff is prevented from proceeding at Law by reason of outstanding terms, and of the title deeds being in defendant's hands ; the applications for assignment of dower, and refusals, are then stated, together with any special circumstances tending to strengthen the plaintiff's case, or afford an answer to any objection that may be anticipated ; after interrogating as to the material statements, as also as to her husband's lands, and the rental and title deeds thereof, and the rents received since his death, the usual prayer is for an inquiry as to the lands of which plaintiff is dowable, and that the plaintiff may be decreed to be entitled to dower thereout, and that her dower may be assigned and set out, and that possession thereof may be delivered to the plaintiff, and that an account may be taken of the rents of such lands since the death of plaintiff's husband, and that one-third part thereof may be paid to the plaintiff.

(a) A respectable text writer, already referred to, thinks the above reason unsatisfactory. *Vide* 1 Roper, Husband and Wife, 456, n. (a).

BILLS FOR DOWER.

Bill for Dower by Widow against Heir-at-law of her deceased Husband.

To the, &c.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant, Jane Jones, widow and relict of John Jones, late of, &c. deceased.

That the said John Jones was, in his life-time, and at the time of his death hereinafter mentioned, seised in fee simple in possession of divers lands, tenements, and hereditaments, situate at, &c.; and being so seised, the said John Jones departed this life on or about the 1st day of July, 1842, leaving your suppliant, his widow, and William Thompson, of, &c., the confederate hereinafter named, his nephew and heir-at-law, him surviving.

Plaintiff's husband seised in fee of lands, &c.,

died, leaving plaintiff his widow, and defendant his heir-at-law.

Your suppliant further sheweth, that shortly after the death of the said John Jones, the said William Thompson as his heir-at-law, entered into possession and receipt of the rents and profits of the said lands of, &c., and hath ever since continued and still is in such possession and receipt; and hath also possessed himself of all the title-deeds, evidences, and writings relating to the said lands.

Defendant entered into possession.

Your suppliant further sheweth, that no settlement or provision in lieu of dower, was made upon or for the benefit of your suppliant upon or before her marriage with the said John Jones, by reason whereof your suppliant, immediately upon the death of her said husband, became, and hath ever since continued, and still is entitled to dower in or out of all the lands and hereditaments of which he was

Plaintiff's title became complete

upon her husband's death.

seised in fee-simple at any time after his marriage with your suppliant, including the said lands of, &c.

Applications.

Your suppliant further sheweth, that being so entitled as aforesaid, your suppliant hath frequently, both by herself and her agents, and in a friendly manner applied to the said William Thompson, and requested him to account for and pay to your suppliant one third part of the rents and profits of the said fee-simple estate, accrued due since the death of the said John Jones, and received by him the said William Thompson, and to assign and set out for your suppliant a full third part of the said fee-simple estate as and for her dower therein.

Refusals.

And your suppliant hoped, &c.

Combination.

But now so it is, *ante*, p. 17.

Pretences.

And the said defendant at times pretends that your suppliant

1. Plaintiff not lawfully married.

Charge time and place of marriage.

2. That defendant has not received any rents, or has accounted with plaintiff.

was never united to the said John Jones in lawful matrimony: whereas your suppliant charges, that on the 10th day of July, 1832 at Dublin, in the parish and parish church of St. Peter, the said John Jones was duly married to your suppliant, and that she is therefore entitled to her dower as aforesaid. And at other times admitting your suppliant's said marriage, the said defendant pretends that he has not received any rents and profits of the said fee simple estate or any part thereof, or if he has received any of such rents, that he has accounted with your suppliant for and paid to her one full third part thereof in lieu and satisfaction of her dower. The contrary of all which said pretences your suppliant charges to be true.

Charge contrary.**Refusal by defendant to set out rental or account of rents received,****or to produce title-deeds. Plaintiff unable to proceed at law.****Averment.****Interrogating part.**

And your suppliant further charges that the said defendant refuses to set forth a rental and particular of the said fee-simple estate and also to set forth a full and just account of all the rents and profits of the said estate accrued due since the decease of the said John Jones, or to produce the title-deeds, evidences, and writing relating to the said estate; wherefore your suppliant is unable to proceed at Law to establish her said demand.

All which actings, pretences, &c. *ante*, p. 18.

To the end, therefore, that the said defendant may, if he can shew why your suppliant should not have the relief hereby prayed and may, upon his corporal oath, to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direc

and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written he is hereby required to answer, that is to say,

1. Whether the said John Jones was not in his life-time, and at the time of his death, seised or entitled in fee-simple in possession, or for some other and what estate of inheritance, of or in the several lands, tenements, and hereditaments situate at, &c., hereinbefore mentioned, or how otherwise?

2. Whether, being so seised or entitled, the said John Jones did not depart this life about the time hereinbefore mentioned, leaving your suppliant, his widow, and the said defendant, William Thompson, his nephew and heir-at-law, him surviving, or how otherwise?

3. Whether your suppliant was not about the time, and at the place hereinbefore mentioned, duly married to the said John Jones, and whether she was not at the time of his death hereinbefore mentioned, his lawful wife, and did not thereupon become entitled to her dower out of the several lands of which her said husband was at the time of his said marriage, or at any time afterwards, so seised as aforesaid, or if not, why not?

4. Whether the said defendant did not shortly after the death of the said John Jones, and when particularly, enter into possession and receipt of the rents and profits of the said lands of, &c., and hath not since continued, and is not still in such possession and receipt, or if not who is in possession and receipt thereof?

5. Whether the said defendant hath not also possessed himself of all or some, and which of the title-deeds, evidences, and writings relating to the said lands?

6. Why, and in what character, did the said defendant enter into possession of said lands and of the rents and profits thereof, or into possession of the title-deeds relating thereto, or any of them, was it not as heir-at-law of the said John Jones?

7. Was there any settlement, or provision in lieu, bar, or satisfaction of dower, made upon or for the benefit of your suppliant, at any time before her marriage with the said John Jones; or has your suppliant at any time during her coverture, done any act for the purpose or which had the effect of barring or defeating her said dower? If so, let the said defendant, in his answer to this your

suppliant's bill, set forth fully and particularly how, or by what act or acts of your suppliant she is so barred.

8. Whether your suppliant hath not made such applications to the said defendant for an account, and for payment of one-third part of the rents and profits of the said lands of, &c. accrued due since the death of the said John Jones, and for an assignment to your suppliant of one-third part of the said lands as and for her dower, as hereinbefore mentioned, and whether the said defendant hath not refused to comply therewith, and why hath he so refused?

9. And let the said defendant set forth upon oath, a full, true, and particular rental of all the messuages, lands, tenements, and hereditaments whatsoever which the said John Jones was seised of or entitled unto in possession in his life-time and at the time of his death, for an estate in fee-simple, or other estate of inheritance in possession, and where the same and each and every part thereof are situate, and in whose custody, possession, or power, the same have been during each and every part of the time since the death of the said John Jones, and at what yearly or other rents or rent; and let the said defendant also set forth a full and particular account of all and every the sums and sum of money which have or hath been received by his order, or for his use, on account of the rents and profits of the said hereditaments which have accrued due since the death of the said John Jones, and when, and from whom, and for what rent, and of what part of the said premises, and when due, the same were respectively received?

Prayer.
That plaintiff
may be decreed
entitled to dower.

Account of
rents received
by defendant
since husband's
death.

Payment of
one-third to
plaintiff.

Assignment
to plaintiff of
one-third of
lands, &c., for
her dower.

And that your suppliant may be declared by the decree of this honourable Court to be entitled to her dower out of the estates of her said late husband of which your suppliant was dowable.

And that an account may be taken, by and under the direction and decree of this honourable Court, of the rents and profits of the said estates wherein your suppliant is dowable, which have accrued since the death of the said John Jones, and have, or might have been received by the said defendant; and that one-third part thereof may be paid to your suppliant.

And that one-third part of such estates as your suppliant is so entitled to as aforesaid may be assigned and set out to her for her dower, and your suppliant let into the full and immediate possession and enjoyment thereof, and decreed to hold the same for her

life. And, if necessary, that a commission may issue for that purpose. Commission to issue, if necessary.

[*And for further relief.*]

Prayer of Bill by Widow claiming Dower in Addition to an Annuity bequeathed by her Husband's Will, the Defendants (the Heir-at-Law, Executors, and younger Children), insisting that she ought to be put to her Election.

And that the aforesaid will of the said John Jones may be established ;

Prayer.

And that your suppliant may be decreed to be entitled as well to her dower out of the estates of inheritance of her said late husband of which your suppliant shall be found to be dowable, as to the said annuity of £50, given to her by his said will.

That plaintiff may be decreed entitled to dower and annuity.

And that the said annuity may be ordered to be paid to her accordingly, and an account taken of what is due to her on foot thereof.

Payment of annuity.

And that an account may be taken of all the estates of her said late husband, which are subject to the dower of your suppliant.

Account of estates on which dower attached. Assignment of dower.

And that your suppliant may be let into the possession and receipt of the rents and profits of one-third part thereof, and may be declared to be entitled to hold and enjoy the same for her life, as and for her dower.

And, if necessary, that a commission may issue for the purpose of assigning and setting out such dower or third part of the said estates to your suppliant.

Commission.

And that an account may be taken of the rents and profits of the said estates of which your suppliant is so dowable as aforesaid, received by, or by the order, or for the use of the said [*defendants who are in possession*], which have accrued due since the decease of your suppliant's late husband, and that your suppliant may be paid one full third part of such rents and profits.

Account of rents received from husband's death.

Payment of one-third thereof to plaintiff.

[*And for further relief, &c.*]

Prayer of Bill by Widow to recover Dower.

Account of
lands wherein
plaintiff is
dowable ;

And that it may be referred to one of the **Masters** of this honourable Court to inquire what lands and tenements wherein your suppliant was dowable, the said John Jones, your suppliant's said late husband, was seised of, at any time since his said marriage with your suppliant, and in particular what lands the said John Jones died seised of, wherein your suppliant was entitled to dower.

of the rents
thereof since
death of her
husband, re-
ceived by the
defendants.

And also to take an account of the rents and profits of such lands and tenements wherein your suppliant was dowable, accrued since the death of the said John Jones, which have been received by the defendants, or by any other person by their order or for their use, and that one-third part thereof, and one-third of the rents to accrue due up to the time when your suppliant shall get possession of her dower lands, may be paid to your suppliant in respect of her dower ; and that it may be referred to the said Master to assign to your suppliant her dower in such lands and tenements, and to set out particular lands and tenements for that purpose.

Master to as-
sign dower
lands ;

or else commis-
sion to issue.

Possession.

Or, if necessary, that a commission may issue for the purpose of assigning and setting out such lands, so that your suppliant may hold and enjoy the same in severalty, as and for her dower ; and that your suppliant may be put into the possession and enjoyment thereof, and may be decreed entitled to hold the same for her natural life, as her dower, and that the tenants thereof may attorn and pay their rents to your suppliant.

Deeds, &c., to
be produced.

And that all deeds and documents relating to the said lands and tenements, in the possession or power of the said defendants, or of any of them, may be produced, as the Master shall direct, for the purposes aforesaid.

[*And for further relief.*]

NOTE.—If the bill be filed by a widow married since the 3 & 4 Will. IV. c. 105, came into operation, it will be prudent to insert in the bill by way of pretence, that the husband had, by some deed, in his life-time, or by his last will, barred the plaintiff's right to dower ; to charge the contrary, and interrogate accordingly. In other respects the frame of the bill will be the same as in the foregoing precedent, save that the prayer should extend to lands to which the plaintiff's husband was entitled, as well as to those of which he was seised, since we have seen that under the late Act, a widow may be endowed of a trust estate, and an estate to which her husband had a right of entry or of action, merely.

BILLS OF INTERPLEADER.

PRELIMINARY DISSERTATION.

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<i>Effect of Dismissal of Bill, on Injunction.</i>	<i>Frame of Interpleader Bill.</i>
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Where two or more persons claim the same debt or duty from a third person by different or separate interests, such third person, not knowing to which of the claimants he ought to render such debt or duty, and fearing injury from their conflicting claims, may file a bill of interpleader against the several claimants, praying that they may be compelled to interplead and state their several claims, so that the Court may adjudge to whom the debt or duty belongs, and that the plaintiff may be indemnified^(a). The plain-
Interpleader bill when to be filed.

(a) In *Hoggart v. Cutts*, Cr. & Ph. 197, Lord Cottenham, C., defines a bill of interpleader with his usual clearness, thus: "It is when the plaintiff says, I have a fund in my possession in which I claim no personal interest, and to which you, the defendants, set up conflicting claims, pay me my costs, and I will bring the fund into Court, and you shall contest it between yourselves. The case must be one in which the fund is matter of contest be-

tiff is supposed to be a mere stakeholder, ready to pay the debt to the party entitled to receive it; and the jurisdiction is founded on the hardship of an indifferent person so circumstanced being vexed by the doubtful titles of conflicting claimants.

Bill of interpleader should shew:

1. That plaintiff is free from personal interest in the fund the subject of suit.

2. That plaintiff is free from personal obligation, standing indifferent,

In order to sustain the suit, the plaintiff must make a case by his bill, shewing that he is a mere stakeholder, not disqualified by any personal interest in the subject matter of the suit.

If the plaintiff claim any interest in the subject matter of the suit, the ground for the interposition of the Court fails altogether, since we have seen that the case made by a bill of interpleader ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them.

Moreover the plaintiff may be disqualified from enforcing interpleader by his position with regard to one of the claimants; he must shew that he is not under any liabilities to the defendants beyond those which arise from the title to the property in contest. Hence, in *Crawshay v. Thornton*, 2 Myl. & Cr. 1, it was decided by Lord Cottenham, C., upon appeal, confirming the decision of the Vice-Chancellor, that the circumstance of the plaintiffs having dealt with one of the defendants in such a manner as to render it possible that the defendant might recover in an action at Law against the plaintiffs, prevented them from maintaining a bill of interpleader, inasmuch as no litigation between the defendants could ascertain their respective rights as against the plaintiffs; and see *Cochrane v. O'Brien*, 6 Ir. Eq. R. 312. On the same principle of the plaintiff not being indifferent, Sir John Leach, V. C., decided in *Mitchell v. Hayne*, 2 Sim. & Stu. 63, that an auctioneer who had a demand for commission could not maintain a bill of interpleader against the vendor and purchaser suing him for the deposit; and see also *Bignold v. Audland*, 11 Sim. 23. It would seem, however, that if the plaintiff's claim be admitted by all parties, its existence is not a good ground of objection; *Vide Crawshay v. Thornton, sup.* (2 Myl. & Cr. 1).

Again, although the plaintiff have no personal interest, he may be precluded by the relationship in which he stands towards one of the parties, from maintaining the suit. For example(a), the relationship that exists between landlord and tenant, and also between principal and agent, forbids that the tenant in the one case, or the agent in the other, should, by a bill of interpleader, question the title which he has himself admitted; and such

tween two parties, and in which the litigation between those parties will decide all their respective rights with respect to the fund."

(a) *Vide* observations of Lord Cottenham, C., in *Crawshay v. Thornton, sup.* at p. 20, in which his Lordship refers the disqualification arising from the relationship of landlord and tenant, and principal and agent, rather to the necessity arising from the principle on which an interpleader bill is founded (that the plaintiff in such suit should be free from personal obligation to any of the parties), than to any positive independent rule.

a bill, if filed merely on the suggestion of a third party, a stranger, claiming under a title paramount to that of the landlord, would be dismissed with costs; *Dungey v. Angove*, 2 Ves. Jr. 304; *Pearson v. Cardon*, 2 Russ. & Myl. 606. But it is obvious that this rule does not apply to defendants claiming under titles derived from or through the landlord or principal; *Cowtan v. Williams*, 9 Ves. 107; *Clarke v. Byne*, 13 Ves. 383; *E. I. Company v. Edwards*, 18 Ves. 376; *Crawford v. Fisher*, 1 Hare, 436; in which last case the principle is thus stated by Sir James Wigram, V. C.: "I admit that where a warehouseman, or other depositary of property, receives such property as bailee for another, *and nothing is afterwards done by the party making the deposit, before he claims to have the property restored to him*, the possession of the depositary must, in many cases, and for many purposes, be considered as the possession of the party making the deposit. But the case assumes a widely different aspect when, after the deposit is made, the party making it has by an act of his own transferred his interest in the subject of the deposit to another. It is clear that in such a case the bailee may compel the depositor to interplead with the party to whom, by the act of the depositor, the property in the goods has been transferred."

And the Court will grant an injunction and continue it to the hearing in a case, where there is a question for the hearing between the defendants, whether the debt which is the subject of the suit has been transferred or not. See *Cochrane v. O'Brien*, *sup.* (6 Ir. Eq. R. 312).

Neither will the circumstance of the tenant having, subsequently to his lessor's death, paid rent to a party claiming under him, in ignorance of his claim being disputed, preclude him from making such person a party to a bill of interpleader; *Jew v. Wood*, Ph. & Cr. 185; 2 Ir. Eq. R. 301, *n.* and cases there cited.

But it is not enough for the plaintiff to shew that he is disinterested, under no personal obligation, and unfettered by any peculiar relationship towards any of the parties, he must also specifically set forth the claims of the defendants, in order to shew that each claims a right, and that the claims are of such a character as to be properly the subject of a bill of interpleader; *Nicholson v. Knowles*, 5 Mad. 47; *Swanton v. O'Callaghan*, 1 Jones & C. 188; *Crawford v. Fisher*, *sup.* (1 Hare, 436); *Suart v. Welch*, 4 Myl. & Cr. 305. If the bill do not shew that each of the defendants whom it seeks to compel to interplead, claims a right, both the defendants may demur; one, because the bill shews no claim of right in him, the other, because the bill shewing no claim in the co-defendant, shews no cause of interpleader; Mitf. Pl. (4th ed.) 142.

3. A *prima facie* right, colourable at least in each defendant against the plaintiff.

Or if the plaintiff shew no right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur; *ib.* 142, 3: in other words, there must be privity of some sort; of estate, or title, or contract, between all the parties. For example, an insurance broker may file a bill of interpleader against several part owners of a ship, *of whose ownership he was aware at the time of insurance*, and who make conflicting demands on him for the sum insured, although he effected the insurance solely

under the direction of one of them acting as the ship's husband, and who claims the full amount insured; but he could not maintain interpleader against a stranger claiming a lien on the funds in his hands under a title paramount to that of the other defendants, since there would be no privity between him and them, and if he were made a party, the bill would be dismissed as against him, with costs, to be paid by the plaintiff; *Vide Stuart v. Welch, sup.* (4 Myl. & Cr. 305). So also a ship-captain might sustain a bill of interpleader against parties claiming adversely *under* the bill of lading, but not against a party claiming *paramount* to it; *Lowe v. Richardson*, 3 Mad. 277. And we have seen that in like manner a party who has contracted to supply a certain article of manufacture for a certain sum, and who has assigned that contract, may be made a party to a bill of interpleader jointly with his assignee, both claiming from the plaintiff the sum contracted for, and the person who originally contracted with the plaintiff having by his subsequent dealing given at least a colour of title to his assignee; *E. I. Company v. Edwards*, 18 Ves. 376.

4. And to the identical same debt or duty.

It is also necessary that the debt or duty claimed should be the same; *Glyn v. Duesbury*, 11 Sim. 139; hence a demand of a fixed rent by one claimant, and of unliquidated damages for use and occupation by another, will not entitle the tenant to sustain a bill of interpleader; *Johnson v. Atkinson*, 3 Anst. 798. So, a demand by successive purchasers for their respective deposits, the lands having been set up to sale a second time, will not entitle the auctioneer to make both, parties to a bill of interpleader; *Hoggart v. Cutts, sup.* (Cr. & Ph. 197).

5. Persons in *esse* capable of interpleading, i. e., conflicting claimants in existence.

Further, the bill must shew, that there are proper persons in *esse* capable of interpleading, and of setting up opposite claims. The case of *Metcalf v. Hervey, sup.* (1 Ves. Sen. 248), affords an illustration of this proposition. The bill in that case stated a rumour that there was issue by a person, which issue was suggested to be entitled to the estate in question, and prayed that if there were any such person he might interplead with the defendant. This bill was held to be novel in principle, as not shewing that there was any such person as could interplead, and dangerous in practice, and therefore not to be supported. See also *Darthez v. Winter*, 2 Sim. & St. 536.

But actual suit against plaintiff not requisite.

It is not necessary that a suit should be actually instituted against a party in order to justify him in filing a bill of interpleader, it is sufficient that conflicting claims be made, the principle on which Courts of Equity afford relief being that the plaintiff has a right to protection against the vexation attending the discussion of several claims; *Angell v. Hadden*, 15 Ves. 244. And if the plaintiff be sued by one defendant at Law, and by another in Equity, the Court will grant an injunction to restrain both suits; *Crawford v. Fisher*, 10 Sim. 479.

Neither is it necessary that the titles should be of the same character; one may be legal and the other equitable, but it must appear that each of the claimants has a *prima facie* title; *Scott v. Glenney*, cited in the notes to *Doran v. Everitt*, 2 Ir. Eq. R. 28; *E. I. Company v. Edwards, sup.* (18 Ves. 377).

BILLS OF INTERPLEADER.

The plaintiff in an interpleader suit must have possession of the subject of the suit, and must offer by his bill to bring it into Court; and the usual order for an injunction is only made on the terms of bringing in the fund in question, *Metcalf v. Hervey*, *sup.* (1 Ves. Sen. 248); *Burnett v. Anderson*, 1 Mer. 405; *Sievekink v. Behrens*, 2 Myl. & Cr. 581; and if interest be payable at Law, the bill should offer to pay interest on the sum in question, for the Court will not interfere to protect the plaintiff unless enabled to give the defendant everything he could recover at Law, *Bignold v. Audland*, *sup.* (11 Sim. 23).

A bill of interpleader is, it would seem, inapplicable to the case of two claimants of land in possession of a third party, since the subject of dispute cannot be brought into Court. See *Metcalf v. Hervey*, *supra*.

In order to guard against the possibility of the proceeding being used for the purpose of delay or collusion, or of giving an advantage to any particular claimant, the plaintiff is required to annex to his bill an affidavit negating any such motive, and the omission of such affidavit, or of an offer on the part of the plaintiff to bring in the fund, would be a ground of demurrer to the bill, *Metcalf v. Hervey*, *supra*; *Hyde v. Warren*, 19 Ves. 322.

In *Bignold v. Audland*, *sup.* (11 Sim. 23), the bill was filed by the officer of a public company, on behalf of the *company*, and it was held that in such case the affidavit ought to state not that the *plaintiff* does not collude, but that, to the best of his knowledge and belief, the *company* does not collude with the defendants. As to the form of affidavit see further, *Stevenson v. Anderson*, *sup.* (2 Ves. & B. 407); *Metcalf v. Hervey*, *supra*; *Dungey v. Angove*, 2 Ves. Jr. 304.

The affidavit is conclusive on the subject of it, and cannot be controverted; *Stevenson v. Anderson*, *supra*.

It is no objection to an interpleader suit that one or more of the defendants are out of the jurisdiction (*Stevenson v. Anderson*, *supra*; *Martinius v. Helmuth*, Coop. C. C. 245; *Rickard v. Hyde*, 2 Ir. Eq. R. 299); if the plaintiff have used due diligence to bring in the absent claimants; nor that the fund, the subject of suit, is small, provided that the claimants think it worth a contest, *Crawford v. Fisher*, *sup.* (1 Hare, 436).

A bill of interpleader does not pray a decree in favour of one defendant against the other, or suggest a case for either of them farther than by shewing they have all some colour of title, which we have seen is necessary, but it prays that the defendants may set forth their several titles, and may interplead, settle, and adjust their demands between themselves; *Angell v. Hadden*, 16 Ves. 204. It also generally prays an injunction to restrain the proceedings of the claimants, or either of them, at Law; but before an injunction will be granted the plaintiff is required to bring the money into Court; and it seems that if an order for an injunction should be obtained without such precaution, the order would be erroneous, and the defendant might move to have the money brought in, or that the injunction might be dissolved; *Clindennin v. O'Keeffe*, 1 Hog. 118.

6. Possession of the fund and offer to bring it into Court.

7. Affidavit annexed denoting collusion

Interpleader suit sustain although defendants out of jurisdiction and the fund small.

Motion for injunction and for liberty to lodge the fi

The usual (a) course is for plaintiff to move on bill and (b) affidavit denying collusion and verifying facts, for liberty to lodge the money in Court and for injunction; *Doran v. Everitt*, *sup.* (2 Ir. Eq. R. 28); *Swanston v. Simpson*, 1 Jones & C. 188. An affidavit to verify, however, though usual is unnecessary to carry this motion; *Walbanke v. Sparkes*, 1 Sim. 365; *Meredyth v. Molloy, Flan. & Kelly*, 195; *Jew v. Wood*, *sup.* (Cr. & P. 185).

It is also unnecessary to insert in the affidavit negating collusion, that the bill is filed without the knowledge of the defendants, *Stevenson v. Anderson*, *sup.* (2 Ves. & B. 407); or, that it is brought at plaintiff's expense, *Metcalf v. Harvey* (1 Ves. Sen. 417).

On dismissal of bill injunction falls.

If the bill be dismissed at the hearing, the injunction falls, and it is therefore unnecessary to make a special application to dissolve, and the plaintiff is entitled to be paid back the money lodged by him for the purpose of obtaining the injunction, subject to any lien the Court may, by its decree, impose on it for the costs of the suit, *Blennerhassett v. Scanlan*, 1 Hog. 363.

If one defendant will not answer the other may move for the fund.

If the money be lodged in Court, and one defendant have answered, and the other defendant have allowed process to issue against him for want of answer, the defendant who has answered, instead of moving to dissolve the injunction, ought to apply to the Court that the money lodged may be paid out to him; *Swanston v. Simpson*, *sup.* (1 Jones & C. 188).

English "Interpleader Act;"

The 1 & 2 Will. IV. c. 58, commonly called the "Interpleader Act," enables a defendant sued in any of the Courts of Law at Westminster, or in the Courts of the Counties Palatine of Lancaster, or Durham, in any action of assumpsit, debt, detinue, or trover, to apply after declaration and before plea, by affidavit or otherwise, shewing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is supposed to belong to a third party who has sued or is expected to sue for the same, and that such defendant does not collude with such third party, but is ready to bring into Court, or dispose of the subject matter of the action as the Court shall direct; and thereupon the Court may order such third party to appear and maintain or relinquish his claim, and in the mean time to stay proceedings in the action; or, with consent of the parties, may dispose of the case in a summary manner.

not extended to Ireland.

There is no Statute in Ireland corresponding to the English "Interpleader Act," it is therefore unnecessary to notice it further.

(a) It was at one time supposed that the injunction could not be obtained until the time for answering had expired, but all doubt on this subject has been long removed, neither is the pendency of a suit by one of the claimants seeking an injunction against the parties to the interpleader suit, any objection to the bill of interpleader; *Warrington v. Wheatstone*, Jac. 202.

(b) This affidavit may be sworn before the bill is filed; *Walker v. Fletcher*, 12 Sim. 420, Ph. 115.

The Court disposes of the questions arising upon bills of interpleader, in various modes, according to the nature of the question, and the manner in which it is brought before the Court. If at the hearing the question between the defendants be ripe for decision, the Court decides it; and if it be not ripe for decision, it directs an action, or an issue, or a reference to the Master, as may be best suited to the nature of the case; *Angell v. Hadden, sup.* (16 Ves. 203).

Questions between the defendants, how decided.

As a general rule it is quite settled that a plaintiff is entitled to his costs out of the fund; *Glynn v. Locke*, 3 Dru. & War. 11; S. C. 5 Ir. Eq. R. 61; as between party and party, *Dunlop v. Hubbard*, 19 Ves. 205. This rule, however, is subject to exception when needless expense has been incurred, in which case the plaintiff will have to bear the costs occasioned by such unnecessary proceedings; *Crawford v. Fisher, sup.* (1 Hare, 436); *Glynn v. Locke, sup.* And in a case where there was gross misconduct on the part of the plaintiff and his Solicitor, they were ordered to pay a defendant his full costs, as between Solicitor and client; *Dungey v. Angove, sup.* (2 Ves. Jr. 303). If there be no fund in Court, costs will be given against the party who occasioned the necessity for the suit; *Aldridge v. Mesner*, 6 Ves. 418; and costs are sometimes given as between the defendants, those of them who are in the wrong being liable to pay the costs of their co-defendants; *Dowson v. Hardcastle*, 2 Cox, 278; *Cowtan v. Williams, sup.* (9 Ves. 107); but no costs will be given between co-defendants in a case where the conduct of all is open to censure; *Meux v. Bell*, 1 Hare, 73.

Costs. Plaintiff gets his costs out of the fund, so far as they are properly and necessarily incurred: as between defendants the party in the wrong pays the costs.

The Court is not disposed to censure, but rather to encourage a plaintiff who delays filing his bill of interpleader to the last moment, because it is much more beneficial to the parties really interested in the debt or duty, if their own proceedings are such as to bring the claims between them to an issue, that that object should be attained without a bill of interpleader, *Sieveling v. Behrens, sup.* (2 Myl. & Cr. 581).

A bill of interpleader sets forth the liability of the plaintiff, and the claims of the several defendants, so as to make it appear, on the one hand, that the plaintiff is a mere stakeholder, without any personal interest in the subject matter of the suit; and on the other, that the defendants claim in privacy, and have all of them some shew of right. It does not suggest a case for the defendants, or pronounce on the validity of their respective titles, but sets forth their conflicting demands, and threats or proceedings against plaintiff, as the case may be; and it further states, that plaintiff is ignorant to which of the defendants he can safely pay or hand over the stake, and prays that the several defendants may set forth and discover their respective titles, and how they make out same, and that they may interplead, and adjust their several demands between themselves, plaintiff offering to pay to such of them as may be found entitled; and that plaintiff may be at liberty to bring the stake into Court; and for injunction against proceedings at Law, &c.

Frame of Interpleader Bill.

There is this peculiarity in an interpleading suit, that the moment a decree is made, the plaintiff has done with it, and though not out of Court,

After decree plaintiff is done with the suit,

save as to his costs ; and the suit will not, after decree, abate by his death.

his suit remaining as the groundwork to give effect to further proceedings, yet having nothing to ask or to give, the Court, if he die, will not require a bill of revivor to be filed. But then he must have prosecuted his suit to a decree ; *Jennings v. Ward*, 1 Mol. 134 ; thereupon the defendants become actors, and the plaintiff is a nonentity except in respect of his costs ; *ib.*

Dismissal, effect of.

The dismissal of a bill of interpleader puts a total end to the suit, and to the jurisdiction of the Court, except so far as is necessary to dissolve the injunction, pay out the money, and reinstate the parties in their original positions ; and nothing can be added to an order of dismissal, by consent or otherwise ; *ib.*

Order for rehearing, notwithstanding dismissal.

But after dismissal, an order for rehearing may be had, and the injunction will be continued in the meantime ; *Jennings v. Nugent*, 1 Mol. 134.

BILLS OF INTERPLEADER.

Bill by Tenant against Devisee of Lessor and Heir-at-law, both claiming Rent from Plaintiff, and threatening Proceedings at Law.

To the, &c.

In Chancery.

Humbly complaining, sheweth unto your Lordship, your suppliant, John Jones, of, &c., that James Thompson, late of, &c., deceased, being in and previously to the year 1830, seised to him and his heirs in fee simple, or of a good and sufficient estate of inheritance in the lands of *Grange* hereinafter mentioned, by indenture bearing date on or about the 30th day of July, 1830, and made between the said James Thompson of the one part, and your suppliant of the other part, the said James Thompson, in consideration of the rent and covenants therein reserved and contained, demised unto your suppliant, in his actual possession then being, as therein recited, and to his heirs and assigns, all that and those the said lands of *Grange*, with the appurtenances, situate, &c. to hold to your suppliant, his heirs and assigns, for the life of Edward Jones, your suppliant's eldest son, who is still living; yielding and paying to the said James Thompson, his heirs and assigns, the yearly rent of £50 sterling, by two equal half-yearly payments, on the 1st day of May and 1st day of November in every year, with the usual powers and remedies for recovery thereof by distress and entry.

Lease from
testator to
plaintiff.

As by the said lease, or a counterpart thereof, which was duly executed by the said James Thompson, and is now in the possession of your suppliant, ready to be produced and proved

when required, reference being thereunto had, will more fully appear.

Plaintiff in possession under lease.

Your suppliant further sheweth, that your suppliant entered into possession of the said lands of *Grange*, under said lease, shortly after the execution thereof, and hath ever since continued and still is in such possession, and regularly paid to the said James Thompson during his life, the said rent of £50 thereby reserved.

Lessor's will,

Your suppliant further sheweth, that on or about the 10th day of May, 1840, the said James Thompson being seised of the reversion of the said lands of *Grange*, subject to the said lease, made and published his last will and testament in writing, executed and attested as by Law required, and thereby devised all his real estate whatsoever unto Jane Thompson his wife, one of the confederates hereinafter named, her heirs and assigns for ever, and appointed the said Jane Thompson executrix of his said will.

devising entire real estate to wife, whom he also named executrix.

Lessor's death,

Your suppliant further sheweth, that the said James Thompson departed this life on or about the 1st day of November, 1841, without having revoked or altered his said will, leaving the said Jane Thompson him surviving.

leaving widow,

to whom plaintiff paid rent

Your suppliant further sheweth, that the said Jane Thompson having claimed the rent due from your suppliant out of the said lands of *Grange*, as devisee of the said James Thompson, and no adverse claim having been set up, your suppliant paid the said rent to the said confederate Jane, and continued to pay same to her up to and for the 1st day of November, 1842.

until 1st Nov. 1842.

1st Dec. 1842, notice by heir-at-law.

Your suppliant further sheweth, that on or about the 1st day of December, 1842, your suppliant was served with a notice in writing, signed by Arthur Symes, one other of the confederates hereinafter named, claiming to be heir-at-law of the said James Thompson, and apprising your suppliant that the will set up by the said confederate, Jane Thompson, was obtained by fraud, and void, and that a suit had been instituted to have same declared fraudulent and void, and by said notice your suppliant was cautioned not to pay any rent due or to grow due out of the said lands of *Grange* to the said Jane Thompson, or any person on her behalf, or that in case of your suppliant so doing, the said Arthur Symes would seek to charge your suppliant with such rent;

cautioning plaintiff against paying rent to widow.

As by the said notice in your suppliant's possession, ready, &c.

Your suppliant further sheweth, that on or about the 10th day of December, 1842, the said Arthur Symes exhibited his bill of complaint in this honourable Court against the said Jane Thompson and several other persons parties defendants thereto, in which said bill the said Arthur Symes claims to be heir-at-law of the said James Thompson, and impeaches and disputes the title of the said Jane Thompson to any estate or interest under the will of the said testator; and the said Arthur Symes claims to be entitled, as against your suppliant, to all rent that accrued due out of the said lands of *Grange* after the service of the said notice of the 1st day of December, 1842.

10th Dec. 1842,
bill filed to set
aside will.

Your suppliant further sheweth, that the said Jane having been served with process of *subpœna* for that purpose, appeared and put in her answer to the said bill, and thereby claimed to be entitled to the said lands of *Grange*, and all rents received thereout, as devisee of said lands under the will of the said James Thompson;

Answer filed by
widow claim-
ing *Grange* as
devisee thereof.

As by the said bill and answer, now remaining filed as of record in this honourable Court, reference, &c.

Your suppliant further sheweth, that on or about the 10th day of May, 1843, the said Jane Thompson delivered, or caused to be delivered, to your suppliant, a notice in writing which was in the words and figures, or to the purport and effect following, that is to say [*set out notice demanding rent due 1st May, and threatening to distrain if not paid*].

Plaintiff served
with notice by
devisee, de-
manding rent.

Your suppliant further sheweth, that the said Arthur Symes, on or about the 1st day of June, 1843, delivered, or caused to be delivered, to your suppliant, a second notice in writing, &c. [*set out second notice by heir-at-law threatening proceedings for recovery of rent due*]; as by said two last-mentioned notices in the possession of your suppliant, ready to be produced and proved when required, reference, &c.

Second notice
by heir-at-law
threatening
proceedings.

Your suppliant further sheweth, that since the service of the said first notice of the 1st day of December, 1842, your suppliant hath declined to pay the rent of the said lands of *Grange* to either of the said confederates, but hath retained the same in his own hands for the benefit of the person or persons who shall be found properly entitled thereto, and there is now due by your suppliant for the rent of said lands, the sum of £50, being for two half-yearly

Plaintiff has
paid no rent
since first no-
tice.

One year's rent due to 1st November, 1843. gales thereof, up to, for, and ending the 1st day of November, 1843.

Plaintiff at a loss to whom rent payable.

Offer to pay into Court.

Combination.

Interrogating part.

Your suppliant further sheweth, that from the circumstances herein set forth your suppliant is at a loss to know, to whom he can pay the said rent, with safety to himself, but he is ready to pay the same into this honourable Court, in order that the said confederates may interplead and settle their claims thereto among themselves.

And your suppliant hoped they would have done so.

But now so it is, &c., that the said Jane Thompson and Arthur Symes combining and confederating together to harass and oppress your suppliant, have insisted, and do respectively insist on the payment of the said rent to them.

And your suppliant charges that he is in the nature of a stakeholder of the said rent, and ought to be protected in the payment thereof; and the said defendants ought to interplead, and to settle and determine between themselves to which of them your suppliant ought to pay the said rent.

To the end, therefore, that the said defendants may, if they can, shew why your suppliant should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer, that is to say:

1. Whether such indenture of lease as hereinbefore mentioned to bear date the 30th day of July, 1830, was not made between such parties, and of such date, purport, and effect, respectively, as hereinbefore mentioned, or how otherwise?

2. Whether Edward Jones, your suppliant's eldest son, in said lease named as *cestui que vie*, is not still living?

3. Whether your suppliant did not shortly, or at some time after the execution of said lease, and when particularly, enter into possession of the said lands of *Grange*, under said lease, and whether he hath not since continued, and is not now in possession thereof, or if not, who is in such possession, and whether he did not pay to the said James Thompson, during his life, the said yearly rent of £50,

reserved by said lease, regularly, when and as the same became due, or how otherwise ?

4. Whether the said James Thompson being seised of the reversion of the said lands of *Grange*, subject to the said lease, did not, about the time hereinbefore mentioned or at some other time, and when particularly, duly make and publish his last will and testament in writing, executed and attested in such manner, and of such date as hereinbefore mentioned, or how otherwise ?

5. Whether he did not thereby devise all his real estate whatsoever unto the said defendant, Jane Thompson, his wife, her heirs and assigns, for ever, as hereinbefore mentioned, and did not also appoint the said Jane Thompson executrix of his said will, or how otherwise ?

6. Whether the said James Thompson did not depart this life about the time hereinbefore mentioned, or at some other time, and when, without having revoked or altered his said will, and whether he did not leave the said Jane Thompson him surviving ?

7. Whether the said Jane Thompson did not claim the rent due from your suppliant out of the said lands of *Grange*, as devisee of the said James Thompson, or in some other and what right, and whether your suppliant did not pay the said rent to the said Jane Thompson, so long as no adverse claim was made thereto, and up to the time hereinbefore in that behalf mentioned, or to whom and when, and up to what time did your suppliant last pay said rent.

8. Whether your suppliant was not served with such notice as hereinbefore mentioned to bear date the 1st day of December, 1842, of such date, purport, and effect, as hereinbefore mentioned, or how otherwise ?

Was not said notice signed by the said defendant, Arthur Symes, and did he not thereby claim to be heir-at-law of the said James Thompson, or in whose right did he claim to be entitled to receive the rent of said lands from your suppliant ?

9. Did not the said defendant, Arthur Symes, about the time hereinbefore mentioned, or at some other time, and when, exhibit such bill of complaint against the said Jane Thompson, and the several other persons parties defendants thereto, as hereinbefore mentioned ; and did not the said Arthur Symes, in and by his said bill of complaint, claim to be heir-at-law of the said James Thompson ; and did he

not impeach and dispute the title of the said Jane Thompson to any estate or interest under the will of the said testator; and did he not claim to be entitled, as against your suppliant, to all rent that accrued due out of the said lands of *Grange*, after the service of the said notice of the 1st December, 1842; or what were the claims stated and set forth by him in said bill, and on what grounds did he rely for supporting such claims?

10. Did not the said Jane Thompson, about the time hereinbefore mentioned, appear to and answer said bill, and did she not thereby claim to be entitled to the said lands of *Grange*, and the rent reserved thereout, as devisee thereof under the will of the said James Thomson, or how otherwise?

11. Was not your suppliant served with such notice by the said Jane Thompson as hereinbefore mentioned to bear date the 10th day of May, 1843, of such date, purport, and effect, respectively, as hereinbefore mentioned, or what were the purport and effect thereof?

12. Did not the said Arthur Symes, about the said 1st day of June, 1843, or at some other time, and when particularly, deliver, or cause to be delivered to your suppliant such second notice, of such purport and effect respectively, as hereinbefore mentioned, or what were the purport and effect thereof?

13. Hath not your suppliant, since the service of the said first notice of the 1st day of December, 1842, declined to pay the rent of said lands of *Grange* to either of the said defendants, and hath he not retained the same in his own hands for the benefit of the person or persons who shall be found properly entitled thereto; and is there not now due by your suppliant, out of the said lands, for rent, the sum of £50, being for the two half-yearly gales thereof, up to, for, and ending the 1st day of November, 1843, or what sum is due by your suppliant out of said lands for rent, and for what period, and ending at what time?

14. Is not your suppliant at a loss to know to whom he can pay the said rent, with safety to himself; and is he not ready to pay the same into Court, in order that the said defendants may interplead, and settle their claims thereto among themselves, or how otherwise?

Prayer.

And that the said defendants may answer the premises, and may

set forth to which of them the said rent doth of right belong and is payable; and that they may interplead together, and settle and adjust between themselves to which of them the said rent ought to be paid, your suppliant hereby offering to pay the said arrears now due from him, to whichever of them may be found entitled thereto, and also to pay all future gales in like manner on being indemnified by this honourable Court, for so doing; or to pay the same into the hands of the Accountant-General of this honourable Court, to be disposed of as the Court shall direct.

That defendants may state to whom rent payable; and may interplead.
Offer to pay to rightful claimant,
or into Court.

And that the said defendants respectively may be restrained by the injunction of this honourable Court, from proceeding at Law against your suppliant for recovery of said rent and arrears of rent. And that your suppliant may have such further relief, &c.

Injunction.

[*Pray subpoena and injunction against both defendants.*]

The defendants, Jane Thompson and Arthur Symes, are required to answer the interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, respectively.

Affidavit denying Collusion.

The said John Jones maketh oath and saith, that he exhibited his bill of interpleader against the defendants in this cause, without any fraud or collusion between him and the said defendants, or either of them; and that he has not exhibited his said bill at the request of the said defendants, or either of them, and that he is not indemnified by the said defendants, or either of them. And this deponent saith, he hath exhibited his said bill with no other intent but to avoid being sued or molested by the said defendants, who are proceeding, or threaten to proceed at Law against him for the recovery of the rent in said bill mentioned.

Plaintiff's affidavit denying collusion with defendants.

Bill of Interpleader by Tenant against Devisee and Assignee of Mortgagee in Possession, both of whom claimed Rent from Plaintiff.

To the, &c.

In Chancery.

Humbly complaining sheweth unto your Lordship, your suppliant, Edward Bolger, of, &c.

By lease of 10th May, 1790, Stephen Ram demised to Joseph Frizell certain lands *hab.* for three lives; one of which is still in being.

That by indenture of lease bearing date on or about the 10th day of May, in the year of our Lord, 1790, Stephen Ram, late of, &c., demised to Joseph Frizell, late of, &c., that part of, &c., containing seventy-seven acres or thereabouts, situate in, &c., TO HOLD to the said Joseph Frizell, his heirs and assigns, for three lives (of which lives one is still in being), at the yearly rent of £41 8*s.* of the present currency; as by the said indenture in the possession of the confederates hereinafter named, or either of them, had your suppliant same to produce, would appear.

By lease of 1st June, 1797, Joseph Frizell demised said lands to Michael Bolger,

Your suppliant further sheweth, that by indenture of lease bearing date on or about the 1st day of June, in the year of our Lord 1797, the said Joseph Frizell demised unto Michael Bolger, late of, &c., ALL THAT AND THOSE, &c. [*same description*], to hold to the said Michael Bolger, his executors, administrators, and assigns, for the term of fifty-two years from the 25th day of March then last past, at the yearly rent of £61 8*s.* of the present currency;

hab. for 52 years.

As by the said indenture in the possession of your suppliant, ready to be produced and proved, will appear.

Interest of Bolger now vested in plaintiff, his personal representative.

Your suppliant further sheweth, that the said Michael Bolger died intestate, and your suppliant has obtained letters of administration of his personal estate and effects forth of the proper Ecclesiastical Court, and your suppliant further sheweth, that the interest of the said Michael Bolger under said lease of the said 1st day of June, 1797, has now become vested in your suppliant, who is the son of the said Michael Bolger, and also his personal representative; and that your suppliant is now in the possession and enjoyment of said lands and premises as tenant thereof, subject to the rent reserved by the said last-mentioned lease.

Your suppliant further sheweth that the said Joseph Frizell having become embarrassed in his circumstances, did by some indenture, the precise date whereof is unknown to your suppliant, but which was executed subsequently to the said lease of 1797, for the considerations in the said indenture mentioned, assign and convey to his brother, John Frizell, then of, &c., his heirs and assigns, **ALL THAT AND THOSE** the said lands of [*same lands*], with their appurtenances, for the term of the lives contained in said lease from the said Stephen Ram to him the said Joseph Frizell ;

Joseph Frizell assigned to John Frizell, all his interest in said lands.

As by the said indenture, in the possession of the confederates hereinafter named, or either of them, had your suppliant same to produce, would appear.

Your suppliant further sheweth, that the said John Frizell became seised of and entered into the possession and enjoyment of the premises comprised in the last-mentioned deed, or of the rents thereof, and for some time received the rents and profits thereof from the tenant of said lands under said lease of the 1st day of June, 1797.

Your suppliant further sheweth, that by indenture by way of mortgage, bearing date the 1st day of May, 1825, and made between the said John Frizell of the one part, and one George Nichols of the other part, he, the said John Frizell, assigned the lands and premises comprised in said lease of the 1st day of June, 1797, to George Nichols, his heirs and assigns, subject to redemption, as therein mentioned.

John Frizell mortgaged said lands to George Nichols.

Your suppliant further sheweth, that the said George Nichols entered into the receipt of the rents and profits of the said lands as mortgagee in possession, and thereupon became entitled to, and did (before any question arose as to his right so to do), actually receive from your suppliant the rents accruing due under said lease of the 1st day of June, 1797, but without any intention on the part of your suppliant as tenant of said lands, to admit or acknowledge the right of the said George Nichols, save so far as his title was admitted by the said John Frizell.

George Nichols as mortgagee, went into possession,

Your suppliant further sheweth, that the said George Nichols died intestate on or about the 10th day of December, 1838, and that Oliver Nichols, one of the confederates hereinafter named, is his heir-at-law, administrator and personal representative, and that the interest in said mortgage, if unpaid and unsatisfied, is now vested in the

and died, leaving Oliver Nichols his heir-at-law and personal representative,

in whom said mortgage is now vested.

said Oliver Nichols, and who accordingly claims to be interested in said mortgage^(a), and in the lands and premises comprised therein, being the same lands which are demised by the said lease of the 1st day of June, 1797; and the said Oliver Nichols has, from time to time, demanded the rents of said lands from your suppliant as the tenant thereof.

In May, 1844,

writ of *capias* served on plaintiff by Oliver Nichols,

for rent claimed by him as mortgagee.

Your suppliant further sheweth, that on or about the 11th day of May, 1844, your suppliant, as the representative of the lessee in said lease of the 1st day of June, 1797, was served with a writ of *capias ad respondendum*, issuing forth of Her Majesty's Court of Exchequer in Ireland, at suit of the said Oliver Nichols, for the sum of £61 8s., for rent claimed to be due to him, as the person in whom the legal estate in said mortgage is now vested, by your suppliant as tenant of the lands and premises comprised in said lease of the 1st day of June, 1797, and that the said Oliver Nichols has threatened, and is actually now proceeding at law for the recovery of said rents.

In December, 1835, John Frizell died, having devised his interest in said lands

to his son William,

Your suppliant further sheweth, that the said John Frizell, the mortgagor, died in or about the month of December, 1835, having previously made his last will and testament in writing, and thereby devised and bequeathed all his interest in the lands and premises comprised in the said head lease of the 10th day of May, 1790, to his son, William Frizell, one other of the confederates hereinafter named, and his heirs and assigns, who thereby became entitled to said lands and premises, subject to said mortgage now claimed by said Oliver Nichols, and subject to the said lease now vested in your suppliant.

who alleges that the mortgage has been paid off, and

Your suppliant further sheweth, that the said William Frizell alleges that the said mortgage debt has been fully paid off and satisfied, and that a re-conveyance of said mortgaged premises has been executed by the proper parties to the said William Frizell, and the said William Frizell is the owner of the reversion of said lands and premises, subject to said lease of the 1st day of June, 1797, and claims to be entitled to, and has demanded from your suppliant as such tenant, the rent of the said lands and premises under said lease, and threatens to proceed at Law against your suppliant for the recovery thereof.

demands rent from plaintiffs,

and threatens to proceed at Law.

(a) A claim is a ground of interpleader; *Langston v. Boylston*, 2 Ves. Jr. 107; *Morgan v. Marsack*, 2 Mer. 110.

Your suppliant further sheweth, that on or about the 3rd day of December, 1844, the said confederate, William Frizell, caused a notice to be served on your suppliant as tenant of said lands, in the words and figures following: "Sir,—I hereby caution you against paying any of the rent arising out of the lands of, &c., to Oliver Nichols, or to any other person claiming under him, inasmuch as he is not entitled to receive same, and I require you to pay same to me. Dated this 3rd December, 1844. Signed, William Frizell."

3rd December, 1844, notice served on plaintiff by William Frizell.

Your suppliant sheweth, that your suppliant communicated unto the said William Frizell the circumstance of the said *capias* having been served on him by the said Oliver Nichols, and that the said William Frizell declared to your suppliant, that all money due on said mortgage had been paid off, and that he, the said William Frizell, was entitled to said rent, and yet he, the said William Frizell, refuses to indemnify your suppliant, in case he should pay over the rent of said lands to him; and the said Oliver Nichols has also been made acquainted with the fact of said notice having been served on your suppliant by the said William Frizell, but alleges that the said mortgage is still outstanding, and is now vested in him as aforesaid.

who yet refuses to indemnify plaintiff, in case of his paying rent to him.

Your suppliant further sheweth, that in consequence of these conflicting claims, and the threats and actual proceedings of said defendants respectively, your suppliant is unable to determine or judge to which of said defendants the rent of said lands of right belongs, or is payable, or to which of them he can with safety to himself pay the same, and they both declare they will turn your suppliant out of possession of the said premises, and not suffer your suppliant to hold or enjoy the same.

Plaintiff at a loss to know to whom to pay rent.

Your suppliant further sheweth, that under pain of distress your suppliant paid to Captain Robert Owen, the agent of the said Stephen Ram, the inheritor and head landlord of said lands, the sum of £20 14s. as and for the head-rent thereof, up to and for the 29th day of September, 1844; and that your suppliant holds his receipt for same; as by the said receipt in your suppliant's possession, ready to be produced and proved, will appear.

Head-rent paid by plaintiff under pain of distress.

Your suppliant further sheweth, that there is now due out of said lands up to and for the 25th day of March, 1845, for rent due by your suppliant, after deducting the said payment of head-rent, which

both the defendants admit ought to be deducted, the sum of £102 2s. of the present currency.

Your suppliant further sheweth, that from the circumstances herein set forth, your suppliant is ignorant to which of the said parties he can safely pay the said rent, but is ready to pay the same into this honourable Court, in order that the said parties may interplead and settle their claims thereto among themselves, and your suppliant well hoped they would have done so.

Combination.

Devises and mortgagee sole defendants.

But now so it is (a), may it please your Lordship, that the said William Frizell and Oliver Nicholls combining and confederating together to harass and oppress your suppliant, have respectively insisted, and do respectively insist on the payment of said rent to them.

And your suppliant charges that he is in the nature of a stakeholder of the said rent, and ought to be protected in the payment thereof, and the said defendants ought to interplead and to settle and determine between themselves to whom your suppliant ought to pay the amount thereof.

All which actings, &c.

In consideration whereof, &c.

To the end therefore, &c. *ante*, p. 309.

Interrogating part.

[*Interrogate fully to the statements and charges, and proceed thus*]:

Prayer,
That defendants may state which is rightful claimant, and interplead.

And that the said defendants may answer the premises, and may set forth to which of them the said rent doth of right belong and is payable, and how in particular they make out their claim thereto, and may be decreed to interplead, settle, and adjust their respective demands between themselves;

Offer to pay rent into Bank,

or into Court.

And that in the meantime your suppliant may be at liberty to pay the arrears of rent so as aforesaid due by your suppliant, deducting the said payment to the head landlord of said lands, into the Bank of Ireland, in the name of the Accountant-General of this honourable Court, to the credit of this cause, which your suppliant hereby offers to do for the benefit of whichsoever of said defendants

(a) The charge of combination is frequently omitted in bills of interpleader, on the ground that it would be inapplicable where the defendants claim distinct rights.

shall appear to be entitled thereto ; and that the said defendants and each of them may be restrained by the injunction of this honourable Court, from all proceedings at Law against your suppliant for the said rent and arrears of rent. Injunction.

And that your suppliant may have such further and other relief, &c.

[*Pray writs of injunction and subpœna against both defendants ; and annex affidavit as ante, p. 579*].

NOTE.—In *Blennerhassett v. Scanlan*, 2 Mol. 539, a bill of interpleader by a tenant against his landlord, and annuitants and mortgagees whose incumbrances were charged on the premises subsequently to the lease, was dismissed, the defendants having alleged by their answers that they only claimed according to their priorities, and that they would not look to the lands if either the creditors or lessor were paid, all the distresses for rent having been proved to have been made by the lessor, for the benefit of all parties.

Bill of Interpleader by the Drawer and Acceptor of a Bill of Exchange against the Assignees of the Drawer, a Bankrupt, and the Holder of the Bill, praying Injunction, &c.

In Chancery.

Humbly complaining shew unto your Lordship, your suppliants John Jones, of, &c., and Arthur Campbell, of, &c., that in the year 1840, your suppliant, John Jones, was indebted to James Call, then of, &c., but now a bankrupt, in the sum of £800, or thereabouts ; and for securing the payment of the said sum of £800 to the said James Call, your suppliant John Jones agreed to give to the said James Call a bill of exchange, to be drawn by your suppliant, John Jones, on and accepted by your suppliant, A. Campbell, for the amount of the said debt, payable to or in favour of the said James Call ; and your suppliant, John Jones, accordingly drew a bill of exchange, bearing date the 21st day of September, 1840, on your suppliant, Arthur Campbell, for the said sum of £800, and payable to the said James Call at six months after date.

21 Sept., 1840.
Bill for £800,
drawn by one
plaintiff, ac-
cepted by the
other, payable
to James Call
in six months
from date.

Yoursuppliants further shew, that yoursuppliant, Arthur Campbell, was the agent of your suppliant, John Jones, and had consented to accept such bill of exchange for and on the account of, and as the agent of your suppliant, John Jones ; and the said bill of exchange was accordingly so accepted by your suppliant, Arthur Campbell ; and after the said bill was so accepted, it was delivered to the said James Call ; but your suppliants, for their greater certainty therein, crave leave to refer to the said bill of exchange when the same shall be produced to this honourable Court.

1st Jan., 1841,
before the bill
fell due, James
Call adjudged
a bankrupt.

His assignees
two of the de-
fendants.

Your suppliants further shew, that the said James Call having committed some acts or act of bankruptcy, a commission of bankruptcy under the seal of the Court of Chancery in Ireland, was awarded and issued against him, and he was thereupon, on or about the 1st day of January, 1841, found and declared a bankrupt ; and John Gosling, of, &c., and George Barker, of, &c. (two of the defendants hereinafter named), were duly appointed and now are assignees of the estate and effects of the said bankrupt ;

As by the said commission and the proceedings thereunder, to which your suppliants for certainty crave leave to refer, when produced, will appear.

The holder of
the bill de-
mands payment.

Your suppliants further shew unto your Lordship, that since the said bill of exchange has become due, a demand has been made on your suppliant, John Jones, as the drawer, and on your suppliant, Arthur Campbell, as the acceptor of the said bill of exchange by A. Solomons, of, &c. (one of the confederates hereinafter named), who is the holder thereof, for payment of the amount of the said bill ; and inasmuch as the said A. Solomons is the holder of said bill, and alleges that the same was endorsed to him *bonâ fide* and for value long before the said bankruptcy, your suppliants were ready and willing to have paid the said bill of exchange, and would have paid the amount thereof to the said A. Solomons, if they could have done so with safety to themselves, and without being liable to the payment of the said sum of £800 over again to the said J. Gosling and George Barker, as the assignees of the estate and effects of the said James Call ; but your suppliants further shew, that your suppliants have lately received a letter or notice in writing from the said J. Gosling and G. Barker, signed by their Solicitor, in the words and figures, or to the purport or effect following, that is to say [*copy*

Notice to plain-
tiff from the
assignees,

letter stating the bill to have been negotiated after the issuing of the commission, and after the adjudication of bankruptcy]; but your suppliants, for their greater certainty as to the date and contents of the said letter or notice, crave leave, &c.

that the bill
was transferred
after the bank-
ruptcy.

Your suppliants further shew, that under the circumstances aforesaid, your suppliants declined to pay the amount of the said bill of exchange for £800, to the said A. Solomons; and your suppliants being willing to pay the amount of the said bill of exchange to either of the parties who were or was justly entitled to receive the amount thereof, applied to the said A. Solomons, and to the said J. Gosling and George Barker, and requested them to settle and adjust between themselves their respective claims to the amount of the said bill of exchange, and to agree as to whom your suppliants ought and might, with safety to themselves, pay the same; and your suppliants were in hopes they would have complied with such requests, as in justice and equity they ought to have done, and that your suppliants should not have been endangered or harassed by claims and demands by all the said defendants respectively, for payment thereof to them respectively.

But now so it is, &c., that the said A. Solomons and J. Gosling and G. Barker, combining and confederating together to harass and oppress your suppliants in the premises, have respectively insisted, and do respectively insist on payment to them of the amount due on said bill; and the said defendants, J. Gosling and G. Barker, as such assignees as aforesaid, claim to be entitled to receive and be paid the whole amount of the said bill of exchange; and the said A. Solomons also claims to be paid the amount of the said bill of exchange, in opposition to the said J. Gosling and G. Barker, as such assignees as aforesaid; and the said J. Gosling and G. Barker, as such assignees as aforesaid, have threatened to bring an action at Law against your suppliants, or against your suppliant John Jones, for payment to them of the said sum of £800; and the said defendant, A. Solomons, has brought an action at Law against your suppliant, John Jones, and an action at Law against your suppliant, Arthur Campbell, to recover from your suppliants the amount of the said bill of exchange, and the said A. Solomons is proceeding in the said several actions at law.

Combination.

And your suppliants charge that they are in the nature of stake-

holders of the said sum of £800 ; and ought to be protected in the payment of the same ; and the said defendants ought to interplead and to settle and determine between themselves, to whom your suppliants ought to pay the amount thereof.

To the end, &c. *ante*, p. 309.

Prayer.
That defendants may interplead.

Offer to pay
and bring into
Court.

That the said defendants may answer the premises, and that they may respectively interplead together, and settle and adjust between themselves to whom the said sum of money ought to be paid, your suppliants hereby offering to pay the same to such of the said parties as may be found to be entitled thereto, and that in the meantime your suppliants may be at liberty to pay the said sum of £800 and the interest due thereon into the Bank of Ireland, in the name of the Accountant-General of this honourable Court, to the credit of this cause, which your suppliants are ready and willing to do.

Injunction,

And that the said defendants may be restrained by the order or injunction of this honourable Court, from proceeding in the several actions at Law so brought for the said sum of £800, and now depending against your suppliants respectively as hereinbefore mentioned, and from commencing any other proceeding at Law against your suppliants, or either of them, touching the matters aforesaid.

[*And for further relief, &c.*]

[*Annex affidavit as ante*, p. 579].

N. B.—A bankrupt will not be permitted indirectly to try the validity of the commission by means of a bill of interpleader by a debtor of the bankrupt against him and his assignees, *Lowndes v. Cornford*, 1 Rose, B. Ca. 180; 18 Ves. 299, and see *Buck. B. Ca.* 273.

Prayer of Bill of Interpleader by Warehousemen against several Persons claiming Goods deposited with Plaintiffs, who have a Lien on the Goods (for Warehouse Charges, &c.) which Lien is admitted by all the Defendants.

[*The bill contained an allegation that the warehouse rent and expenses on the goods amounted to the sum of £50, and that plaintiffs claimed no right in or to the goods, except in respect of their charges,*

their right to which was(a) admitted by the defendants, both defendants claiming only subject to the payment of the said sum of £50.

The bill also shewed that the double claim arose by act of the depositor, subsequent to the deposit; that the plaintiffs stood indifferent, and were not liable to either party, independently of the title to the property, and that the plaintiffs did not collude with either of the defendants. The prayer is as follows] :—And that the said defendants A. and B. may set forth to whom the said iron, so as aforesaid deposited with your suppliants, of right belongs, and may be decreed to interplead and adjust their said several demands between themselves, and that it may be ascertained in such manner as your Lordship shall think fit, to which of them the said A. and B., the said iron belongs or ought to be delivered over, your suppliants hereby offering to deliver the same to such of them the said A. and B. as the same shall appear of right to belong to, or otherwise to dispose of the same as this Court shall direct, on being indemnified by this honourable Court in so doing. And that whatsoever order your Lordship may make respecting the said iron so as aforesaid deposited with your suppliants, proper directions may be given with respect to the lien which your suppliants have upon the same, so as to preserve to your suppliants the benefit of such lien; and that in the mean time the said A. and B. may be restrained by the injunction of this Court from prosecuting their actions at Law so commenced as aforesaid, and from commencing any other actions or proceedings at Law or in Equity against your suppliants touching the matters aforesaid [and for further relief].

[Annex the usual affidavit].

For bill of interpleader by a tenant against heir and devisee of his lessor, both claiming the rents, see *Swanston v. Simpson*, 1 Jones & C. 188.

For bill of interpleader by purchaser of real estate, against heir and executor of the seller, both claiming the purchase-money, see *Earl of Carlisle v. Globe*, 2 Freem. C. C. 148.

For bill of interpleader by trustees, against two persons, each claiming the trust property, see *Goring v. Bickerstaffe*, 2 Freem. C. C. 165.

(a) Vide *Mitchell v. Hayne*, 2 Sim. & Stu. 63, shewing the importance of such an allegation when plaintiff claims any interest in the subject matter of the suit.

Prayer.

That defendants may interplead.

Offer to dispose of the property as Court may direct.

That plaintiff's lien may be preserved.

Injunction.

For bill of interpleader by auctioneer, against the buyer and seller of a horse returned as unsound, see *Aldridge v. Mesner*, 6 Ves. 418.

For bill of interpleader by the trustees of an Insurance Company, against the grantor and grantee of an annuity secured by an assignment of the policy of insurance, see *Morgan v. Marsack*, 2 Mer. 107.

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